COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

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NOVA SCOTIA DEPARTMENT OF LABOUR AND MANPOWER
RESEARCH DIVISION

HONOURABLE DAVID NANTES
MINISTER

H. R. MACDONALD
DEPUTY MINISTER

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TABLE OF CONTENTS

Foreword ii

1. Listing of Grievance Arbitration Decisions, 1983 i

2. Subject Index, 1978 - 1983 90

3. Employer & Union Index, 1978 - 1983 105

4. Brown & Beatty Topical Code Index, 1978 - 1983 120

FOREWARD

This publication is the fifth summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour and Manpower. The decisions listed are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of Nova Scotia have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia Trade Union Act and have been included as a matter of general interest. Subsequent to this date, summaries of grievance arbitration decisions have been prepared and released in the publication Monthly Summary of Activities, Industrial Relations Division, Labour Relations Board. Further arbitration awards received by the department will continue to appear in the above publication.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour and Manpower. Results of appealed decisins are received on an an hoc basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1983. For summaries of decisions previous to 1983 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 1977).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour and Manpower, Research Division, Library, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424:4313).

Jean Dobson
Director

Research Division
Nova Scotia Department of Labour and Manpower
Halifax, Nova Scotia
1984

PART 1

LISTING OF GRIEVANCE ARBITRATION DECISIONS, 1983

DECISION: 83-01

The New Glasgow Police Association, Local 103 of the Police Association of Nova Scotia AND The Town of New Glasgow, a Municipal Corporation

J. A. MacLellan, Chairman; Douglas Eddy and Charles McDougall

Bruce Evans, for the union
R. B. MacDonald, for the employer
January 18, 1983

ISSUE: Secondary Sources of Jurisdiction - Promissory Estoppel 2:2200; Penalties for Work Related Misconduct - Disciplinary Demotion 7:3544; Distribution of Work Within the Bargaining Unit - Express Prohibitions in the Agreement 5:2200.

CIRCUMSTANCES: The grievor was relieved of his position as second-in-command of a police platoon after he allowed a television camera crew to photograph the police station and jail and spoke to them in an interview. The loss of this position meant a possible loss in pay as well as a loss of priority in determining vacation leave.

The grievor maintained that this discipline did not comply with the Collective Agreement. Alternatively, if the action was not a disciplinary action, he was relieved from the position without just cause.

The Town maintained that the Board had no jurisdiction to hear the matter because it derived authority from the Collective Agreement which did not mention the position of the platoon second-in-command. Therefore, the grievor was not disciplined because he could not be demoted from a position that did not exist.

AWARD: The Board found that the second-in-command position had been in existence for a number of years and had been recognized as such by both parties although not included in the classification of the Collective Agreement. Such action constituted promissory estoppel. Therefore, the grievor was demoted and the Board had the jurisdiction to hear the grievance in part. The Town was ordered to comply with the Collective Agreement allowing the Grievor to have his grievance properly processed under the requirements of the Police Act. Parties were to share equally in costs.

While concurring with the findings of the chairman, Mr. Eddy questionned whether the position had been recognized by both parties for some years. The question had not risen during negotiation of the last three contracts, there was no evidence that the position vacancy had ever been posted as required by the Collective Agreement for other positions, nor could parol evidence be accepted to contradict, vary, add to or subtract from the terms of a written instrument.

Mr. Eddy also questionned whether promissory estoppel existed. Reliance upon the estoppel of the employer's actions must be to the detriment of the employee, here it was to his advantage. As well, the doctrine can work only as a "shield" and not as a "sword" to displace the contract in an affirmative or positive sense.

DISSENT: (MacDougall) felt that the Board should have awarded the Grievor his former position, compensating him for time lost.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, pp. 67-8; Re: Ellis v. Abeli (1884) 10 O.A.R. 226; Re: Collingwood Shipyards and U.S.U. 13 L.A.C. (2d) 73; Combe v. Combe (1951) 1 All E.R. 767; Anson's Law of Contract (24th ed.); Frito-Lay Canada Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647 10 LAX [sic] (2d).

DECISION: 83-02

Eastern Provincial Airways Limited AND Canadian Air Line Employees' Association

Innis Christie, Arbitrator

J. J. Nyman, for the union
Ralph D. Farley, for the employer
January 13, 1983

ISSUE: Form and Content of the Collective Agreement - Ancillary Documents 4:1200; Overtime - Scheduling 5:3100.

CIRCUMSTANCES: During the last Collective Agreement, articles governing part-time employees were incorporated in anticipation of the reduction of the hours of some full-time employees to that of part-time in light of economic conditions. The Letter of Understanding accompanying the Agreement limited the hours of work of a part-time employee to four (4) consecutive hours a day and a maximum twenty (20) hours per week. The Company initiated a schedule where part-time employees worked four hours and fifteen minutes each day for six days and then had three days off.

The Union grieved that this scheduling exceeded the maximum hours allowed in the Letter of Understanding, thereby depriving full-time employees of overtime work.

The Company relied on the article of the Collective Agreement stating that the total number of hours in the shift schedule for full-time employees was the equivalent of forty hours. Counsel argued that this implied averaging and by implication from the incorporation by reference to that article in the Letter of Understanding allows for averaging for part-time employees as well.

AWARD: The Arbitrator found no ambiguity in the Letter of Understanding, therefore the Company could not schedule six and three day shifts. No damages were awarded to the Union because no full-time employees lost work. In fact fewer hours were worked by part-time employees on the six and three schedule than would have been worked if on the five and two schedule requested by the Union.

AUTHORITIES: Re: Canadian Air Line Employees Association and Air Canada, unreported, January 20, 1982 (Weatherill).

DECISION: 83-03

Island Telephone Company Limited AND International Brotherhood of Electrical Workers, Local 1030

Innis Christie, Arbitrator

Paul J. D. Mullin, for the union
Linda St. Jean and David McLane, for the employer
January 13, 1983

ISSUE: Seniority - Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Seniority - The Skill and Ability Requirement - Examinations and Tests 6:3340; The Collective Agreement - Interpretation of Collective Agreement - The Object of Construction: Intention of the Parties 4:2100; Organization of the Workplace - Distribution of Work Within the Unit - Express Prohibitions in the Agreement 5:2200; Arbitration Process - The Adducing of Evidence - Real and Documentary Evidence 3:3100.

CIRCUMSTANCES: The grievor grieved when an employee with less seniority was promoted to the job for which he had applied. The Collective Agreement stated that, in selecting employees for promotion, the Company was to recognize seniority, ability and qualifications. Where those factors were relatively equal, the senior employee was to be selected.

The successful applicant had more training and scored much higher on a standard written test. The grievor suggested the test was an unfair method of evaluation.

AWARD: The Arbitrator found that the relevant clause in the Collective Agreement had departed from the former standard "contest" seniority clause without going all the way to a standard "minimum requirement of competence" clause. Therefore the three factors were to be considered as a package in judging applicants. The Arbitrator found that the successful applicant therefore rated higher. He also found that the use and application of the standard test was not improper or prejudicial to the grievor.

The grievance was dismissed.

AUTHORITIES: Telephone Plant Workers of Prince Edward Island, Local Union 1030, International Brotherhood of Electrical Workers v. Island Telephone Company Limited, grievance of Allison Ellis, unreported, May 11, 1982 (G. Christopher Collier, Arbitrator); Westeel Products Ltd. (1960), 11 L.A.C. 199; Brown and Beatty: Canadian Labour Arbitration (1977), para 5:2200, 3:3100, 6:3340; Lady Galt Towels Ltd. (1969), 20 L.A.C. 382; Reynolds Aluminum Co. of Canada Ltd. (1974), 5 L.A.C. (2d) 251; New Brunswick Broadcasting Co. Ltd., unreported, 1982 (Christie, Arbitrator); Carling Breweries Limited (1968), 19 L.A.C. 110; Great Atlantic and Pacific Co. of Canada Limited and Canadian Food and Allied Workers, Local 175 (1976), 13 L.A.C. (2d) 211; Canadian Broadcasting Corporation (1980), 26 L.A.C. (2d) 34; Governing Council of the University of Toronto (1981), 30 L.A.C. (2d) 187.

DECISION: 83-04

Hermes Electronics Limited **AND** International Brotherhood of Electrical Workers, Local 1651

S. Bruce Outhouse, Chairman; Ronald Penney and Donald H. McDougall

Ronald A. Pink, for the union
Hector McInnes, Q.C. and Sara Filbee, for the employer
January 18, 1983

ISSUE: Organization of the Workplace - Assignment of Work Outside the Bargaining Unit - Bargaining Unit Work 5:1200; Organization of the Workplace - Assignment of Work Outside the Bargaining Unit - Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400; The Arbitration Process - The Hearing: Preliminary Matters - Onus or Burden of Proof 3:2400.

CIRCUMSTANCES: The Union grieved when sono buoys being tested by the Company were delivered to the testing site by the engineers conducting the tests. According to the Collective Agreement, the functions of shipping fall within Bargaining Unit work. In the past, Bargaining Unit Employees, shippers, had delivered equipment to the testing site. Exceptions had been made when engineers, Non-Bargaining Unit Employees, had carried buoys on planes as incidental baggage en route to a testing site.

The Union also grieved that a company truck had been driven by an employee not in the Bargaining Unit. When a supervisor was approached to ask who was driving the truck and why, the Union representative was told that another suprvisor was taking the attached trailer to be safety inspected. Believing this to be Bargaining Unit work, the Union grieved, later finding out that the trailer had not been safety inspected but unable to ascertain from the Employer who had driven the truck and why.

AWARD: Both grievances fail. The Board found that the engineers were entitled to carry with them the material, that is the sono buoys, needed to carry out the experiments. They distinguished between that situation, the same as when the engineers carried the buoys on the plane as incidental baggage, and a situation where the engineers carried equipment which they did not use, in which case, it would be considered Bargaining Unit work.

The Board determined that the onus of proof that the truck was used for Bargaining Unit work fell on the Union. This onus was not discharged.

DISSENT: (Penney) disagreed with the majority that the engineers were able to carry the buoys with them to the test site. He interpreted this to be Bargaining Unit work as the Employer had recognized in transporting equipment to other test sites. He pointed out that a separate truck had been used to transport the buoys and that the incidental argument could not apply without opening up all aspects of the intent of the Collective Agreement with respect to the duties of the driver/shipper.

AUTHORITIES: Re Longyear Canada Inc. and International Association of Machinists, Local Lodge 2412 (1981), 2 L.A.C. (3d) 72 (Picher). Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500 (1975), 9 L.A.C. (2d) 173 (Gorsky).

DECISION: 83-05

Bolands AND Bakery, Confectionary and Tobacco Workers International Union, Local 446

Judge J. A. MacLellan, Arbitrator

Wallace Jewers, for the union
Gregory North, for the employer
January 28, 1983

ISSUE: Discharge and Discipline - Theft 7:3310; Penalty 7:3314

CIRCUMSTANCES: The company operated a distribution warehouse in which items such as candy and cigerates were stored. During a police investigation of on-site theft involving another employee, the grievor, a warehouseman, admitted that he had consumed two chocolate bars belonging to the company. The bars had been in an open carton and one of the bars had been damaged. The grievor did not believe that he was stealing when he consumed the bars. Regardless, he was immediately dismissed.

The grievor was 28 years old, married, had an otherwise excellent work record and had been an employee for 7 years. The company maintained that discharge was necessary because: (1) the theft rate by employees was believed high, (2) the company had consistently dismissed employees for theft in the past, and (3) the employees had been warned in meetings that theft meant immediate discharge.

AWARD: The grievience succeeds. In view of the particular circumstances where the grievor himself felt that he was not doing anything wrong, and the employer-employee trust relationship had not been fractured, the grievor shall be given another opportunity at his employment. Discharge is substituted for a 2 month suspension.

DECISION: 83-06

Nova Scotia Power Corporation AND Canadian Brotherhood of Railway, Transport and General Workers, Local 507.

Frank L. Elman, Q.C., Arbitrator

Tom Barron, for the union
Gregory North, for the employer
February 2, 1983

ISSUE: Discipline and Discharge - Grounds - Absence from Work - Reasonable explanation of absence 7:3112; Employee Disability 7:3200; Innocent Absenteeism 7:3210; Discipline and Discharge - Absence from Work - Alcoholic beverages or drugs 7:3560.

CIRCUMSTANCES: The grievor, a coal handler and employee for 9 years, was dismissed for excessive innocent absenteeism. Over the last 6 years, the grievor had been absent an average of 49.3 days per year, more than four times the plant average. During the last two years the employer had expressed its concern with the grievor's absenteeism. His absences were bona fide in that he suffered from various illnesses, primarily acute anxiety attacks which he maintained resulted from his working conditions, i.e. high noise level, temperature extremes, and dangerous and dirty work. The grievor did not disclose the existence of an alcohol problem to either his union or employer prior to his termination. Had he done so, he would have been treated differently by the employer, according to the provisions of the collective agreement.

After his dismissal, the grievor received help for his alcohol problem and at the grievance hearing contended that he was able to return to work.

AWARD: The grievance fails. The authorities suggest that an employer is justified in dismissing an employee for innocent absenteeism if (1) the absenteeism is excessive and (2) there is no real evidence that the employee is capable of regular attendance in the foreseeable future. Once the employer has established that absenteeism is excessive, the burden lies with the employee to establish that attendance will be regular and consistent in the future.

In this case, the employer has established excessive absenteeism on the part of the employee. The grievor has failed, however, to satisfy his employer at the time of his discharge or the arbitrator at the hearing that he was capable of returning to work on a regular basis. The employee failed to adduce any medical evidence of his ability to resume regular work. Therefore, based on the employee's past conduct, in all likelihood he would be incapable of regular attendance in the future. The employer is under no obligation to find the grievor a different job within the plant.

AUTHORITIES: Massey Ferguson Ltd. (1969) 20 L.A.C. 370; Re Niagara Structural Steel (St. Catherine's) Ltd. and United Steelworkers' Local 7012 (1978) 18 L.A.C. (2nd) 385; Re Crouse - Hinds Canada Ltd. and UAW, (1982) 3 L.A.C. (3d) 231; Re Kimberly Clark of Canada Ltd and Canadian Pipe Workers' Union, Local 307 (as reported in Re City of Sudbury and CUPE, (1982) 2 L.A.C. (3d) 174); Re City of Sudbury and CUPE, (1982) 2 L.A.C. (3d) 174.

DECISION: 83-07

Construction Association Management Labour Bureau (H.M.W. Industries Ltd.) AND Millwrights and Machine Erectors, Local Union 1178.

S. Bruce Outhouse, Arbitrator

John Merrick, Michael Wood, for the union
George MacDonald, Brian Johnston, for the employer
February 2, 1983

ISSUE: Assignment of work outside the bargaining unit - Bargaining unit work 5:1200; Jurisdiction of the arbitrator - Waiver of procedural irregularities 2:3130.

CIRCUMSTANCES: This grievance is brought by the union. It contends that one of the Bureau's members, H.M.W. Industries Ltd., violated the hiring provisions of the collective agreement entered into between the Bureau and union. Under the agreement, the employer committed itself to hire millwright tradesmen through the exclusive agency of the union for construction industry work. In this instance, H.M.W. manufactured and supplied stop-logs and guides for the Fundy Tidal Power Project at Annapolis Royal; however, problems developed at the site with the stop-logs that required the logs to be returned to the employer's plant in Truro for corrections. A month later repairs were completed and the logs returned to the site.

The union has argued that the work done on the stop-logs after their original delivery to the site was millwrights' work and should have been offered to the union's members rather than done by the employer's own employees. The Bureau argued that the work did not fall within the collective agreement because it was not "construction industry" work as defined in S.89(c) of the Trade Union Act, S.N.S. 1972, c. 19, as amended. The work was not "on site constructing" but rather took place at the plant in Truro. The union's response was that the work fell within the definition because the work had the inherent character of on-site work, and the mere removal of the stop-logs from the site to the Truro plant did not deprive the work of its essential on-site character.

There were two preliminary objections by the Bureau to the arbitrator's jurisdiction. First, the grievance was never reduced to writing as required by the collective agreement. The arbitrator dismissed this objection, holding that the Bureau had by its conduct waived its right to object to such a lack of formality; furthermore, S.103 of the Trade Union Act, which supercedes the grievance procedure set out in the collective agreement, does not require that the grievance be reduced to writing.

The second preliminary objection was that S.91(5) of the Trade Union Act confers exclusive jurisdiction on the Construction Industry Panel to determine whether a matter is a matter relating to the construction industry. The arbitrator also dismissed this objection. He held that under S.103 of the Trade Union Act it is left to arbitrators, not to the Panel, to resolve disputes concerning the application of collective agreements in the construction industry.

AWARD: The grievance fails. The words "on-site" in S.89(c) of the Act must be given their literal meaning, i.e. they refer to the location where the work was performed and not, as the union contended, to the type of work performed. Thus, work which is not performed on-site cannot be considered construction industry work; conversely, the same work carried out on-site might well constitute construction industry work. Therefore, the repair work carried out on the stop-logs at the employer's plant was not construction industry work and thus not covered by the collective agreement.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (1977), pp 81-83; Construction Association Management Labour Bureau Ltd. and International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, Local 73 et al, (1976) L.R.B. No. 392C.

DECISION: 83-08

Coca-Cola Ltd. AND Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 361.

S. Bruce Outhouse, Arbitrator

Elliot Posen, for the union
Brian Johnston, for the employer
February 9, 1983

ISSUE: Criteria: equal work or equal skill 5:2420.

CIRCUMSTANCES: The grievor, an automotive mechanic for several years at the employer's Halifax bottling plant, was placed in Wage Bracket 5 in the collective agreement. He contended that he should have been placed in Wage Bracket 6. Wage Bracket 5 covers "cooler and equipment maintainance men"; wage Bracket 6 covers "journeyman automotive maintenance men (holding N.S. licenses)". The present dispute arises because the Regulations under the Apprenticeship and Tradesmen's Qualifications Act establishes two licenses: (1) mechanical trade, covering automobiles and light trucks, and (2) bus and transport trade, covering heavier trucks and transport vehicles. The grievor has the mechanical trade license and argued that qualifies him for wage bracket 6. The employer, on the other hand, contended that "N.S. license" meant the bus and transport trade license and thus he is not qualified for wage bracket 6, even though the grievor has satisfactorily performed all of the duties of an automotive mechanic in the employer's garage for several years. Of the three mechanics in the garage, only one has the bus and transport trade license and he is in wage bracket 6. He therefore receives a higher rate of pay for performing the same work as the other two.

The arbitrator ruled that the phase "N.S. licence" was ambiguous and consequently allowed the presentation of evidence of past practice and negotiating history; however, the arbitrator found that such evidence was not particularly helpful in determining which interpretation was the more correct.

AWARD: The grievance succeeds. The grievor is entitled to be placed in wage bracket 6 and is entitled to that rate of pay retroactive to July, 1982, the inception of the collective agreement. The collective agreement embodied the principle that employees performing the same work are entitled to equal pay. Since the grievor is performing the job of an automotive maintenance man, he is prima facie entitled to the rate of pay that attaches to that position, unless the collective agreement provides otherwise. If the employer intended to give a special restricted meaning to the words "N.S. License", then it should have clearly expressed that meaning in the collective agreement or during the course of negotiations.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (1977), p. 198; Re Sudbury Mine, Mill and Smelter Worker's Union and Falconbridge Nickel Mines Ltd, (1969) 20 L.A.C. 45.

DECISION: 83-09

Halifax Infirmary AND Canadian Brotherhood of Railway, Transport and General Workers Union, Local 615.

R. Lorne MacDougall, Chairman; A. K. Cunningham, D. H. MacDougall

G. J. McConnell, D. Pothier, for the union
E. B. Durnford, Sara Philbee, for the employer
February 7, 1983

ISSUE: Discipline and discharge - Grounds - Attendance at work 7:3100; Reasonable excuse 7:3112; Employee disability 7:3200; Inability to discharge employment obligations 7:3220; Employer responses other than termination 7:3240; Exceptions 7:3620; Health and Safety 7:3621; Disciplinary penalties - scope of review 7:4100.

CIRCUMSTANCES: The grievor, a medical stenographer, experienced severe respiratory attacks when she worked in the medical transcription room of the hospital. Other employees had suffered minor health problems in the room, but none to the same degree as the grievor. Unfortunately, the grievor's work could only be carried out in the transcription room. Tests of the room by the hospital revealed that contaminants were below permissible levels.

Because of her respiratory attacks, the grievor was discharged in November, 1981. She grieved that decision and was reinstated on April 26, 1982. Upon her return, she told the employer that she was ready, willing and able to work but not in the transcription department. The employer responded by refusing to give her alternate employment and insisting that she return to her old position. She was also warned that under article 19.05 of the collective agreement an employee who is absent from her employment without permission for five consecutive days shall be deemed to have resigned. For the next five days, the grievor reported for work at the appropriate time and continued to refuse to work in the transcription room. On the sixth day, the employer informed her that she was deemed to have resigned. The grievor now seeks reinstatement and compensation.

AWARD: The grievance succeeds in part. The grievor is entitled to reinstatement but on a layoff status. She may apply for any new positions or vacancies created within the bargaining unit. The Board also suggested that she be allowed to retain her seniority indefinitely while she was on layoff. She was not entitled to any monetary compensation, however, because there had been no new vacancies or positions created since April 26, 1982.

Under these unusual circumstances, the grievor did not fall under Article 19.05 of the collective agreement; the absence contemplated there involves a lack of notice to the employer that the employee is to be away from work. In fact, here the grievor reported for work on each of the five days. Thus, the grievor was not deemed to have resigned her position. Furthermore, she was not guilty of insubordination; her refusal to work in the transcription room was reasonable in light of her health problems.

DISSENT: Cunningham argued that the grievor should be awarded full compensation back to April 27, 1982, and that she be placed on layoff effective the date of the arbitration award, and the first vacancy for which she is qualified to fill must be referred to her, subject to the claims of more senior employees for such vacancy.

AUTHORITIES: Re Acme Steel Co. of Canada Ltd. and United Steelworkers, Local 6572, 10 L.A.C. (2d) 393; Re Regional Municipality of Peel and International Brotherhood of Electrical Workers, Local 636, 12 L.A.C. (2d) 135; Re International Nickel Co. and United Steelworkers, Local 6166, 4 L.A.C. (2d) 103; Re Domtar Packaging Ltd. and Retail, Wholesale and Department Store Union, Local 414, 12 L.A.C. (2d) 378; Re Liquid Carbonic Canada Ltd. and United Steelworkers, Local 12990, 9 L.A.C. (2d) 52; Re Canadian Safety Fuse Co. Ltd. and International Union of District 50, Allied and Technical Workers, Local 14132, 3 L.A.C. (2d) 77; Re Dalhousie University and Dalhousie Staff Association, April 3, 1979, unreported; Re McKellar General Hospital and Service Employees Union, Local 268, (1981) 30 L.A.C. (2d) 229; Re Steel Co. of Canada Ltd. and United Steelworkers, Local 105, 4 L.A.C. (2d) 315; Re Penticton and District Retirement Service and Hospital Employees' Union, Local 180, 18 L.A.C. (2d) 107.

DECISION: 83-10

The Lord Nelson Hotel Limited **AND** Hotel Employees and Restaurant Employees Union, Local 662

J. A. MacLellan, Chairman; Rene Quigley and Donald McDougall

Henry Martell, for the union
Eric Durnford and K. Sara Filbee, for the employer
February 10, 1983

ISSUE: Discipline - The Reasonableness of the Penalty - The Doctrine of the Culminating Incident 7:4310; Discipline - Insubordination - Refusal to Follow Instructions 7:3610; Seniority - The Skill and Ability Requirement - Trail, Training and Familiarization Periods 6:3230.

CIRCUMSTANCES: The grievor was dismissed after he fell asleep during his lunch hour and, returning to work late, failed to perform the duties which he had been assigned. The hotel argued that this was the culminating incident. During the six years he had worked at the hotel, first in the engineering department and then as a houseman, the grievor had had two letters of reprimand placed in his file and had been spoken to several times by supervisors about his uncooperative attitude. The hotel felt that he did not fit into the team method used at the hotel.

The grievor agreed that his attitude had been a problem while he worked in the engineering department but he insisted that it had greatly improved. He argued that the incident for which he was dismissed was too minor for so severe a punishment, especially one that would bring him economic hardship.

AWARD: The grievance is dismissed, the discharge being upheld. The grievor was made aware of deficiencies but made no effort to improve. The evidence of his entire work record indicated an accumulation of negative work habits. Although the final incident may not warrant discharge, the grievor's accumulated work record did. The hotel gave sufficient warnings and had no vindictiveness or ulterior motive in discharging the grievor.

DISSENT: Quigley felt that the grievor should be reinstated since the hotel had not fulfilled the responsibility negotiated in the Collective Agreement to manage the company and direct its operation and workforce because it had not implemented a training program for the grievor when he switched responsibilities, despite the fact that he did not feel it necessary.

AUTHORITIES: International Union of Mine, Mill and Smelter Workers, Local 902 and Standard Dairy 12 L.A.P.C. 37.

DECISION: 83-11

Western Electric Limited **AND** International Brotherhood of Electrical Workers, Local 265

Eric G. DeMont, Arbitrator

R. A. Pink, for the union
Eric Durnford, for the employer
February 8, 1983

ISSUE: Organization of the Workplace - Assignment of Bargaining Unit Work to Non-employees: Contracting Out 5:1300; The Collective Agreement - Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; The Collective Agreement - Interpretation of Collective Agreements - Dictionaries 4:2210; Union Rights and Liabilities - Union Rights - Union Security 9:1200.

CIRCUMSTANCES: The Union grieved that Union security, as provided for in the Collective Agreement with the Construction Association Management Labour Bureau, was violated by the contract entered into by Western Electric and H.B.M. Mechancial Limited, both members of the Bureau. The article in question obligated the Union to furnish any employer requesting the same with a supply of competent and qualified workmen. An employer was permitted to use employees already on the payroll but any additional workers needed had to be supplied by the Union.

If Western had fulfilled its contract for work at the Nova Scotia Power Corporation's project site itself, it could have sent only one man from the Halifax area, where its offices were located, obtaining the rest of the work force from the Union. However, Western contracted with H.B.M. who supplied the work force while adhering to the terms of the Collective Agreement.

At issue was whether the Western - H.B.M. contract was a sub-contract which would be allowed by the Collective Agreement. If it was not, the Union should have supplied all but one member of the work force.

No definition for "sub-contract" being provided in the Collective Agreement, dictionary definitions were used.

The Union argued, based on case law, that applying the tests for "contracting out", i.e. control, ownership of the tools, chance of profit and risk of loss, that the employees of H.B.M. became "de facto" employees of Western, thereby violating the terms of the Collective Agreement. Their argument rested on equating "contracting out" with "sub-contract".

AWARD: The grievance fails. Using dictionary definitions, the Western - H.B.M. contract was a sub-contract. The same conclusion was reached when the Union argument was extrapolated and "contracting out" was substitutedfor "sub-contract" in the relevant article of the Collective Agreement, which was permitted as long as the Collective Agreement was binding on the sub-contractor; H.B.M. did adher to the Collective Agreement and the arbitrator found no evidence that the contract was entered into in bad faith in order to defeat the purpose of the clause in the Collective Agreement dealing with union security.

AUTHORITIES: Golden Eagle Case 11 L.A.C. (2d) 237. Brown and Beatty: Canadian Labour Arbitration, para. 5:1300.

DECISION: 83-12

Joneljim Concrete Construction Limited AND Labourers International Union, Local 1115

Judge Robert F. Ferguson, Arbitrator

T. J. K. Gillis, for the union
Frank L. Elman, for the employer
November 6, 1982

ISSUE: The Collective Agreement - Interpretation of Collective Agreement - The Object of Construction: Intention of the Parties 4:2100; Organization of the Workplace - Distribution of Work Within the Bargaining Unit - Express Prohibitions in the Agreement 5:2200.

CIRCUMSTANCES: The Union grieved that the Company had wrongly transferred employees from a commercial project to the building of a wash house at a mine site, which the Union alleged was an industrial project. According to the terms of the Collective Agreement between the Union and the Construction Association Management Labour Bureau, industrial labourers must be used on industrial projects. Therefore, the Company should have obtained workers for the construction of the wash house from the Union Hall Hiring List. The Company maintained that construction of the wash house was a commercial project and it did not, therefore, err in transferring the workers.

At issue was the interpretation of a clause in the Collective Agreement defining industrial projects.

AWARD: The grievance succeeds. After considering all the evidence and giving careful consideration to the meaning of the clause in question, the arbitrator found that the wash house should be considered an industrial project.

AUTHORITIES: Canadian Industries Ltd. (Windsor Works) (1951), 3 L.A.C. 853; Brown and Beatty: Canadian Labour Arbitration, p. 162.

DECISION: 83-13

W. Eric Whebby Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

Milton J. Veinot, Arbitrator

Ronald A. Pink, for the union
Eric Durnford, for the employer
February 15, 1983

ISSUE: The Collective Agreement - Form and Content of the Collective Agreement - Pension, Insurance and Welfare Plans 4:1400; Jurisdiction of the Arbitrator - Remedial Authority of the Arbitrator - Compliance Orders 2:1450; Jurisdiction of the Arbitrator - Promissory Estoppel - Applications of Promissory Estoppel 2:2220; Jurisdiction of the Arbitrator - Compliance with the Grievance Procedure - Time Limits 2:3128.

CIRCUMSTANCES: Following certification of the Union by the Nova Scotia Labour Relations Board, the Employer attempted unsuccessfully to rescind the certification. During this time the Employer did not recognize the terms of the Collective Agreement, which detailed applicable wages, vacation pay, welfare and pension benefits. Letters were exchanged between the Union and the Employer and their respective solicitors, the first letter, from the Union, stating that they looked forward to the Employer's cooperation in paying the benefits which were in arrears, a later letter stating the Union's intention to have an arbitrator appointed, and a final letter from the Employer's solicitor.

At issue was the date which the Union first made its grievance, i.e. from what date the award should be made. The Union contended that the Company was estopped from alleging that the Union did not perfect its rights to proceed because the final letter from the Employer's solicitor led them to believe that the Company was in agreement with them.

The Employer argued that the award was effective only when the grievance was effectively filed, that being the date when they threatened to go to arbitration or the date on which an arbitrator was requested. The Employer also denied that any undertaking was implied in its solicitor's letter and therefore there was no estoppel.

AWARD: The arbitrator examined the Collective Agreement and the Trade Union Act to determine the point at which a grievance may be said to have been filed. He interpretated the requirement to be the fact that one party bring home to the other that a violation of the Agreement is apprehended, and that one party will rely on its remedies in some legal fashion. Using this criterion, the arbitrator decided that the letter in which the Union stated its intention to have an arbitrator appointed was the date of effectively filing a grievance and that the award of benefits in arrears should commence forty-eight hours from the date of the letter, i.e. the date on which the Employer would have received such notification. He found no estoppel in the words of the Employer's solicitor's letter.

AUTHORITIES: G. and S. Masonry (Clarke, September 10, 1979); Rite Way Builders (Langille, December 28, 1979); Re. Canadian Union of Public Employees, Local 1392 and Governors of Dalhousie University (1980), 39 N.S.R. (2d) 653 (N.S.S.C.T.D.).

DECISION: 83-14

Maritime Telegraph and Telephone Company Limited AND International Brotherhood of Electrical Workers, Local 1030.

R. Lorne MacDougall, Arbitrator

Ronald A. Pink, for the union
Gregory I. North, for the employer
February 14, 1983

ISSUE: The Arbitration Process - The Hearing: Preliminary Matters - Preliminary Objections 3:2100; Jurisdiction of the Arbitrator - Limits to the Arbitration of Grievances: Arbitrability - Compliance with the Grievance Procedure - Policy Grievances 2:3124; Jurisdiction of the Arbitrator - Limits to the Arbitration of Grievances: Arbitrability - Compliance with the Grievance Procedure - The form of the Grievance 2:3122; The Collective Agreement - Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; Jurisdiction of the Arbitrator - Primary Sources of Jurisdiction - The Submission to Arbitration 2:1300.

CIRCUMSTANCES: The arbitration deals with the preliminary objection of the Employer to a grievance filed by the Union.

Following a series of layoffs due to economic conditions, the Union wrote to the Employer outlining ways in which the layoffs of full-time employees could be avoided and asking for the reinstatement of those already laid off. In the absence of response from the Employer, the Union filed a grievance under the article of the Collective Agreement which stated that the Employer must make every reasonable effort to avoid layoffs.

The Employer contended that the grievance did not disclose an arbitrable issue. Counsel pointed to the management rights clause of the Agreement, maintaining that it was restricted by the clause under which the grievance was filed only if the Employer acts in bad faith. Counsel also pointed to the following clause which outlined the conditions for layoffs in economic conditions. Therefore, as long as management is motivated by economic conditions, then its decisions satisfy any requirment to be reasonable and for an Arbitrator to hold otherwise would involve them in regulation of business and extend their authority beyond that set by labour jurisprudence and the Collective Agreement. Counsel also stated that individuals still had recourse to grieve layoffs and request reinstatement under the established guidelines. Further, the Collective Agreement does not allow for a broad review such as the Union requested.

Counsel for the Union argued that it was a classic case of a Union grievance affecting the entire Bargaining Unit. In this case, it is the duty of the arbitrator to become involved because of the specific clause of the Agreement.

AWARD: The arbitrator found that the grievance did disclose an arbitrable issue.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, pp. 49-50.

DECISION: 83-15

Canso Seafoods Limited **AND** United Food and Commercial Workers International Union, Local 910.

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Deborah Carver, for the employer
February 18, 1983

ISSUE: Discipline and discharge - Incompetence 7:3510; Unsuitability 7:3530; Warnings, suspension, discharge 7:3542; Preliminary objections 3:2100.

CIRCUMSTANCES: The grievor worked in a production line at a fish plant where each employee is evaluated as to the quality and quantity of work performed. While there was no complaint as to the quality of her work, she consistently fell below the quantity of work expected. Both the grievor and the employer agreed she could improve her quota. After the first three steps in the discipline procedure had been followed (verbal and written warnings followed by a suspension), the grievor was discharged. The foreman on duty the night of the discharge stated he had not fired her, but told her she had the rest of the shift to improve or else she could be fired. The grievor and the shop steward who was present both said the foreman had clearly stated the grievor was fired. This resulted in her not finishing her shift and led to the arbitration.

AWARD: It was felt that the employer had meant to give the grievor another chance to improve her work, and the discharge was the result of a misunderstanding between the two parties as to the supervisors intentions. The grievor is reinstated immediately and the penalty is changed to a seven week suspension. Compensation is awarded from the end of the suspension to the day she returns to work.

The arbitrator noted that the disciplinary procedure being followed by the employer did not confirm to the specifications of the collective agreement and suggested the parties rectify this.

DECISION: 83-16

Canso Seafoods Limited AND United Food and Commercial Workers International Union, Local 910.

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Deborah Carver, for the employer
February 18, 1983

ISSUE: Hours of Work 5:3100; Past practice 3:4430; Promissory estoppel 2:2200; Collective Agreement - Interpretation 4:2100.

CIRCUMSTANCES: For the past eight years the Freezer Department shifts have remained consistant. The employer wants to alter the time at which these shifts begin and end in order to alleviate a waiting period between the fresh fish being processed and its reaching the Freezer Department. As the employees liked the previous shift hours they objected to the change and presented the following justifications for their objections. The collective agreement specifies that the day shift cannot be altered without the consent of the union; past practice shows the hours of the shifts have never been altered, therefore the Freezer Department is included in the day shift and the employer is estopped from changing the working conditions. The employer argues that as the Freezer Department is not specifically covered under the day shift clause it has the right to alter the shift hours as it wishes, and supports this by showing that the beginning and ending hours of the shifts differ from the day shift hours set down in the Collective Agreement.

AWARD: As the agreement does not specifically refer to the Freezer Department as the day shift, the restrictions in changes to hours of work do not apply. Therefore the employer has the right to alter the shift hours and the grievance fails.

DECISION: 83-17

Canso Seafoods Limited AND United Food and Commercial Workers International Union, Local 910.

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Deborah Carver, for the employer
February 18, 1983

ISSUE: Discipline and discharge 7:2000; Abandonment, settlement and withdrawal 2:3230.

CIRCUMSTANCES: The grievor claims unjust dismissal. Counsel for the employer claimed the grievance had been settled and withdrew from the hearing. Counsel for the union denied the grievance was settled. After trying to get Counsel for the employer to remain and being unsuccessful, the Arbitrator continued the hearing. The union argued that as the employer submitted no evidence to support the discharge, the grievor should be reinstated.

AWARD: The grievance succeeds and the grievor is reinstated with full compensation from the day of discharge.

DECISION: 83-18

Canso Seafoods Limited AND United Food and Commercial Workers International Union, Local 910.

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Deborah Carver, for the employer
February 18, 1983

ISSUE: Lay-off 6:2200; Bumping 6:2330; Seniority 6:2000; Estoppel 2:2210; Employer - Change of status 3:1200.

CIRCUMSTANCES: The grievor is a painter in a fish plant who claims unjust lay-off as he had seniority over others. According to the collective agreement he had the right to bump painters who worked on the trawlers. At the time of the lay-off the union assumed all these workers worked for the same employer and were covered by the collective agreement. However, the fish plant and trawler operations are owned by separate companies, a fact unknown to the union at that time. All employers still belong to the same bargaining unit. The union has one seniority list for all employees but the employer had a separate list for the trawler painters and had not made the union aware of this. The employer claims that since there are now two separate employers, the new seniority lists for each operation are in effect. The union argues that the company is estopped from using this new relationship to refuse employees from either operation from excercising bumping rights throughout the bargaining unit for these reasons: the union was not told there was more than one employer involved nor that separate seniority lists were maintained; the grievor always understood he could bump painters from either section, and had done so in the past.

AWARD: The grievance succeeds. The employer was estopped from raising the issue of a new employer and therefore a new seniority list. The grievor had the right to bump junior employees. He is to be rehired immediately and compensated for six weeks lost work.

DECISION: 83-19

Inter Supply Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Union, Local 927.

Gregory North, Judge J. A. MacLellan, David Reynolds

Raymond Larkin, for the union
Eric Durnford, Sarah Filbee, for the employer
February 16, 1983

ISSUE: Discipline and discharge - Insolent and unco-operative behavior 7:3660; Fighting, Assault 7:3430; Disciplinary penalties - Mitigating factors 7:4400; Estoppel 2:2200; Preliminary objections 3:2100; Form of grievance 2:3122; Waiver of procedural irregularities 2:3130.

CIRCUMSTANCES: The grievance is one of wrongful dismissal. Before the grievance was heard, the employer raised a preliminary objection to the arbitrability of the grievance because the union had not filed a written grievance as set forth in the collective agreement. The union argued the employer had agreed to forego the grievance procedure and submit to arbitration, and presented letters to and from the employer discussing the upcoming arbitration. The employer denied agreeing to bypass the grievance procedure. The question of arbitrability was not raised by the employer until the day before the hearing although they knew of the arbitration several months previously. The Board decided there had been an agreement to proceed directly to arbitration, and the employer is estopped from using this to object to the arbitrability of the grievance.

As to the grievance itself, the grievor was discharged after a disagreement with his supervisor. During the altercation the supervisor used abusive language and the grievor left the office saying he was going to the union to report the incident. Shortly after the grievor was called back and in effect told he was fired, at which time he responded with obscene language and a threatening gesture directed at the supervisor. While the grievor admitted the employer had grounds for discipline, he felt discharge was too extreme. He had an excellant work record, and felt he had been provoked by the supervisor.

AWARD: The grievor recognized that his behavior was inappropriate, and was willing to apologize and accept some form of disciplinary action. The board decided that as he was provoked in the incident the discharge was too severe and was replaced with a two week suspension.

DISSENT: North agreed with the employer's preliminary objection that as the grievance had not been submitted in writing, the procedure specified in the collective agreement had not been followed. He felt the employer had never agreed to waive the grievance procedure. Therefore the Board lacked jurisdiction to hear the matter.

AUTHORITIES: Merchant and the H.A. Robert Group Limited, (1977) 81 D.L.R. (3d) 223 (Sask. Q.B.).

DECISION: 83-20

Glace Bay Community Hospital AND Canadian Brotherhood of Railway, Transport and General Workers, Local 607.

Judge Robert F. Ferguson, Arbitrator

Mr. George Boudreau, for the union
Robert A. Cooke, for the employer
February 4, 1983

ISSUE: Organization of the Workplace - Vacancies 5:2510; Interpretation of Collective Agreements - The Collective Bargaining Context 4:2300; Organization of the Workplace - Job Posting 5:2520; Seniority - Promotion and Lay-off Procedures - Job Posting 6:2310

CIRCUMSTANCES: The union alleged that the employer violated the collective agreement in the manner in which it filled a vacant position.

Notice of the vacant position was posted, according to procedure, in the usual area. It was filled by someone who was not a member of the bargaining unit who had several applications for a permanent position on file with the Director of Nursing, although he had not applied specifically for the position posted.

The union contended that a distinction should be made between the filling of a new position and the filling of an existing position. In the case of the former, the article in the collective agreement regarding vacancies and appointments should apply but in the case of the latter, the articles in the collective agreements dealing with seniority and with the purpose of the agreement should apply. Therefore, the position in dispute should have been given to the member of the bargaining unit on whose behalf the union was grieving because of his seniority. Although the grievor had not seen and applied for the position, the union argued that his personnel records should be considered as application.

The employer argued that the article in the collective agreement dealing with vacancies was specific to the case in dispute while the articles to which the union referred were general in nature. Nor did they agree that a personal file was synonymous with an application for employment.

AWARD: The grievance fails. The arbitrator distinguished between a personal file and an application as two separate things. To consider them synonymous would render redundant articles in the collective agreement providing for the posting of vacancies and create an unworkable situation for the employer. Nothing in the definition section of the collective agreement distinguished filling an existing position from filling a newly created one; therefore, the article concerning vacancies applied in this case. The employer had complied with all stipulations of that article in filling the position.

DECISION: 83-21

Northside General AND Canadian Brotherhood of Railway, Transport and General Workers.

Judge Robert F. Ferguson, Arbitrator

George Boudreau, for the union
Robert A. Cooke, for the employer
February 4, 1983

ISSUE: Compensation - Holiday Pay and Other Benefits 8:3140; Compensation - Multiple Benefits 8:3330; The Collective Agreement - Prior Arbitration Awards and Judicial Decisions 4:2220; The Collective Agreement - The Object of Construction: Intention of the Parties 4:2100.

CIRCUMSTANCES: The grievor was scheduled to work December 24th, 25th, 26th and 27th. Being ill, he called in sick those four days. The employer paid him for two sick days, deducting them from his accumulated sick days, and holiday pay for the other two days.

The grievor maintained that he was entitled to sick pay as well as holiday pay for the 24th and 25th. The employer argued that having been paid for one benefit, he was not entitled to concurrently obtain the other benefit, since both covered the same contingency. They felt that distinction should be made between having the emplyer compensate the employee for a loss and paying him an additional benefit.

AWARD: The grievance succeeds. The Board's mandate was to determine the award based on interpretation of the collective agreement. Their finding was that, under the collective agreement, the grievor was entitled to sick pay and holiday pay for the two days in question, there being nothing in the agreement to disentitle the grievor.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 450; Re Building Service Workers Union, Local 220, and the Sarnia General Hospital (1972) 24 L.A.C. 181 (Shime).

DECISION: 83-22

Maritime Beverages Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927.

Donald McDougall, Judge J. A. MacLellan, Wallace Jewers

Ronald Pink, for the union
Sara Filbee and Eric Durnford, for the employer
February 21, 1983

ISSUE: Discipline - Sabotage 7:3410; Discipline - Refusal to Follow Instruction 7:3610; Discipline - Incompetence 7:3510; Discipline - Failure to Co-operate 7:3580.

CIRCUMSTANCES: The grievor was suspended for two days after he got water into an electrical motor while cleaning the surrounding area. The motor subsequently failed and required repairs. On a previous occassion, the grievor had done the same thing, had been warned of the danger of getting water in electrical appliances and had been told to cover the electrical parts of the machinery when cleaning the area. The grievor was also criticized for his negative attitude when verbally reprimanded.

The grievor maintained that his attitude was not negative and denied that he had been told to cover the machines the night in question. He stated that two other employees, working that night could have gotten the water in the motor. He asked that the suspension be replaced with a letter of reprimand.

AWARD: The grievance fails. The action of the grievor was wrong and given the grievor's opportunities to correct his bad habits, the discipline imposed by the company was not unreasonable.

DECISION: 83-23

Scott Maritimes Limited AND Canadian Paperworkers Union, Local 440.

J. K. Bell, Judge J. A. MacLellan, Donald H. McDougall

Gerald McConnell, for the union
Hector McInnes, for the employer
February 17, 1983

ISSUE: Discipline - Theft 7:3310, 7:3312, 7:3314; The Collective Agreement - Company Rules 4:1500; Discipline - Mitigating Factors 7:4400; Jurisdiction of the Arbitrator - Reinstatement and substitution of penalty 2:1470.

CIRCUMSTANCES: The grievor was discharged after he was discovered during a security check removing scrap materials from the work premises without permission. The company had specific rules for employees to follow when taking scrap material home, the enforcement of which were included in the collective agreement. Removal of company property was listed in the agreement as one of the two most serious offences, it being cause for disciplinary measures up to and including discharge.

Under the Trade Union Act of Nova Scotia, section 41, the Arbitration Board has the "power to substitute for the discharge or discipline any other penalty that ... seems just and reasonable in the circumstances". Evidence was presented that the company had relaxed its discipline in allowing articles for personal use to be constructed from scrap materials during slow times at work and management admitted that permission to take the material would probably have been granted if the grievor had requested it. The grievor was a satisfactory employee although a previous altercation with a fellow employee, about which he had lied to his employer, remained on his record. The grievor did not appear to give evidence at the hearing.

AWARD: The grievance succeeds. Exercising their discretion, the Board reduced the discharge to a two-month suspension.

DISSENT: McDougall felt unable to support the majority decision. Removal of company property was considered an offense serious enough by both the union and the employer to include it in the collective agreement, specifying a possible penalty as severe as discharge. No evidence was given by the grievor, except the statement he made at the time he was detained by security that this could cost him his job, indicating that he realized the seriousness of his action. Because of his absence at the hearing, no mitigating factors were presented that would provide the arbitration board with reason to reduce the penalty. There was also the evidence of the grievor's past work record. As well, the evidence presented regarding the relaxation of company rules was in relation to something quite different from the removal of company property. Therefore, he felt that the dismissal should be upheld.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 376 ff.

DECISION: 83-24

Cape Breton Development Corporation AND Canadian Brotherhood of Railway, Transport and General Workers, Local 504.

Frank L. Elman, Arbitrator

Thomas Barron, for the union
Gordon Stewart, for the employer
February 22, 1983

ISSUE: Union Liabilities - Rights Under the Agreement 9:2210; Secondary Sources of Jurisdiction - Promissory Estoppel 2:2200, 2:2210; Compensation - Computation of Vacation and Vacation Pay 8:3230; Jurisdiction of the Arbitrator - Individual Contracts of Employment 2:1210.

CIRCUMSTANCES: The grievor arranged to take his vacation prior to the normal miner's vacation in exchange for being one of the five clerical workers within the bargaining unit working at the mine site when everyone else was on vacation. While the grievor was away on vacation, the mine workers went on strike, effectively closing the employer's operation, so that no work was available for the grievor when he returned from vacation. He applied for and received U.I.C. benefits, but only after the two-week waiting period during which time he received no money. The other workers on strike received their U.I.C. benefits plus vacation pay.

The grievor argued that the employer had violated the articles of the collective agreement providing full employment to employees with regular attendance, no lay-offs except in good faith and without discrimination and the continuted existence of past customs and conditions except by mutual agreement to change, after discussion. Arguing promissory estoppel in the agreement with management to take an early vacation, the grievor asked for a remedy because his expectation to return to work after his holidays was unfulfilled.

AWARD: The grievance fails. Promissory estoppel may be used only "as a shield, not as a sword." No effect can be given to a grievance based on an oral promise because all grievances must be based on the collective agreement. The collective agreement, as a contract made independently between the union and the employer governs all aspects of the master-servant relationship. In this case, the employer did not violate the provisions of the collective agreement or act in bad faith. The arbitrator found it to be the bad "luck of the draw" that the grievor was two weeks without wages or U.I.C. benefits, envisioning that in other circumstances, an early vacation could have been to the grievor's advantage.

AUTHORITIES: Combe v. Combe (1951) 1 All E.R. 767; McGavin Toastmasters Ltd. v. Ainscough et. al. (1975) 54 D.L.R. (3d) 1.

DECISION: 83-25

Western Electric Ltd., Construction Association Management Labour Bureau Limited AND International Brotherhood of Electrical Workers, Local 625.

S. Bruce Outhouse, Arbitrator

Fern Tardiff, for the union
Hugh Simpson, for the employer
February 24, 1983

ISSUE: Distribution of Overtime 3:2417; Proprietary Rights to Overtime Assignments 5:3220; The Skill and Ability Requirement 6:3000; Practicability 6:3000.

CIRCUMSTANCES: The collective agreement states the job steward is to be given first option on overtime ahead of other employees unless it is not practicable. When two employees worked three hours of overtime to complete a job, without the job steward first being asked, he grieved. The union argues he should have been asked to do the work of one of the men, but the employer claims this wasn't practicable as the two men had worked together on that particular job for several days and were familiar with technical aspects of the job. Economically, the employer felt it would take longer and therefore be more expensive to use the job steward, and that it was management's right to use discretion whether or not it was practicable to use the job steward. The union said the work to be done was routine and as the grievor had done similar work before, the amount of overtime would not have been increased.

There was an initial question from the employer as to want of proof due to a disagreement about the date the overtime was worked. The union gave the date as December 8 in its written grievance, which was dated December 14, but the employer claims the overtime was worked on December 15, one day after the grievance was filed. The employer argued it only had to meet the specific claims in the written grievance, i.e. overtime on December 8, and as their records show December 15 the grievance should be dismissed.

AWARD: The arbitrator refused to dismiss the grievance because of the discrepancy of dates. It was a technical irregularity and not of sufficient import to detract from the real issue which was that overtime was worked and the job steward had not been given first option on those hours. He accepts the argument that the employer has discretion as to what is practicable on an economic basis, however in this case it would have been practicable for the grievor to work the overtime and not increase the employer's costs. He felt the employer may have been looking for rationalization for the oversight of not offering the overtime to the job steward. The grievance succeeds.

AUTHORITIES: Millwrights and Machine Erectors, Local 1178 and Construction Association Management Labour Bureau Limited (January 1, 1983), unreported (Outhouse); Federal Labour Union, Local 24762 and Sunbeam Corporation (Canada) Limited (1965), 16 L.A.C. 343 (Keville); Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 8 O.R. (2d) 103 (Ontario C.A.).

DECISION: 83-26

The Metropolitan Authority of Halifax, Dartmouth and Halifax County AND Correction Officers Association of Nova Scotia

S. Bruce Outhouse, Chairman; David P. Reynolds; Donald H. McDougall

Raymond Larkin, for the union
A. William Cox, Q.C., for the employer
February 23, 1983

ISSUE: Promotion, Demotion and Transfer 6:2100; Burden of Proof 3:2400; Non-disciplinary Demotion 7:3546; Employer Response Other Than Termination 7:3240.

CIRCUMSTANCES: The grievor, who works at the Halifax County Correction Centre, was transferred from his position as Recreation Officer to that of Correction Officer, and claims it was a discriminatory action by the employer. The grievor has had significant absenteeism over the past few years, all due to valid medical problems. The employer says the transfer is for economic reasons and while the absenteeism is directly responsible for the move, they accept the legitimacy of his absences and say the transfer is not disciplinary. A Recreation Officer must be replaced if he is absent whereas it is optional to replace a Correction Officer. The employer felt the grievor's medical problems might be continuous and wanted to ensure their costs would not increase as a result of more absenteeism. The grievor had been asked to transfer voluntarily and when he refused the employer exercised their rights to do so regardless of the grievor's objection.

The union claims the transfer was a form of discipline as no other employees, even with similar absenteeism records, were transferred. The Board feels the employer was quite clear in indicating throughout the grievance that the transfer was not a reflection on the grievor's work record, and the Board does not see the transfer as disciplinary. As such, the burden of proof lies with the union to prove discrimination.

The next point raised was by the employer: that the move was not a transfer but rather an assignment, and as both jobs were within the same classification, the 'assignment' was not grievable. The Board did not accept this argument and found the move to be a transfer, and therefore capable of being grieved.

The employer's main argument then was their right to transfer employees based on economic considerations if they thought leaving the grievor where he was would cost them more money in replacement time. The grievor's physician testified that he considered the grievor physically fit, and the union argued any claim of possible absenteeism in the future was only speculation.

AWARD: The grievance fails. The Board agrees that a transfer because of potential cost saving was justified as the grievor might continue to have a high rate of absenteeism.

DISSENT: Reynolds did not agree for several reasons. He saw the transfer as a demotion because Recreation Officer positions were generally regarded as being more desirable than those of Correction Officers, and this was the first instance of involvuntary transfer within the insitution. As the grievor's medical problems were not chronic, it was wrong to assume they would recur or lead to further absenteeism. Finally, the employers argument that he would not have to be replaced if he were absent while a Correction

Officer does not hold. Past practice shows the Correction Officers usually were replaced, and so the option of not replacing staff in the Correction section was not normally exercised.

AUTHORITIES: Gould Manufacturing of Canada Limited, Burgess Division and International Moulders and Allied Workers' Union, Local 115 (1978), 18 L.A.C. (2d) 286 (Burkett); Federal Labour Union, Local 24762 and Sunbeam Corporation (Canada) Limited (1965), 16 L.A.C. 343 (Reville); Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 8 O.R. (2d) 103 (Ontario C.A.); Carleton University and Carleton University Academic Staff Association (1978), 20 L.A.C. (2d) 283 (Palmer); Notre Dame Integrated School Board and Newfoundland Teachers' Association (1978), 22 L.A.C. (2d) 286 (Harris); Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al (1981), 124 D.L.R. (3d) 684 (Ontario C.A.); McCarthy v. Rice and I.B.E.W., Local 625 (1977, L.R.B. no. 456C); United Automobile Workers, Local 397 and Barber-Ellis of Canada Ltd. (1968), 19 L.A.C. 163 (Schiff); Allied Chemical Canada Ltd. and United Automobile Workers, Local 89 (1973), 3 L.A.C. (2d) 267 (O'Shea); Atlas Steels Co. and Canadian Steelworkers' Union, Atlas Division (1975), 8 L.A.C. (2d) 350 (Weatherill); Niagara Structural Steel (St. Catherines) Ltd. and United Steelworkers, Local 7012 (1978), 18 L.A.C. (2d) 385 (O'Shea); Crouse-Hinds Canada Ltd. and United Automobile Workers (1981), 3 L.A.C. (3d) 230 (Brown).

DECISION: 83-27

Construction Association Management Labour Bureau Limited **AND**
International Brotherhood of Electrical Workers, Local 625.

R. Lorne MacDougall, Q.C., Arbitrator

G. J. McConnell, for the union
Eric Durnford, for the employer
March 4, 1983

ISSUE: Pension, Insurance and Welfare Plans 4:1400; Extrinsic Evidence 3:4400; The Object of Construction: The Intention of the Parties 4:2100.

CIRCUMSTANCES: The grievance concerns the interpretation of the collective agreement as it pertains to pension contributions by the employer for overtime worked by employees. The union claims double contributions are required as each employee recieves two hours pay for each hour of overtime worked, and the pension contributions should correspond. The employer claims it is still pay for one hour worked and the pension contributions should be the same as for straight time.

For two years most of the members of the Employers Association have been making double contributions to the pension plan for all overtime and the union uses this to support their interpretation of the agreement.

The Board allowed the union to submit documents from the contract negotiations which indicated the union meant that pension contributions were to be made according to each hour paid rather than "each hour worked", a phrase used in other benefit clauses. The union is asking for compensation for the withheld contributions from the date the contract was signed to the date the grievance was filed (approximately two years).

AWARD: The grievance succeeds; the union's interpretation is correct. However, the Board did not agree with the claim for two year's compensation. As the union did not file a grievance until almost two years after the contract was signed, the employer is not liable to claims before that date.

AUTHORITIES: G. & S. Masonry Limited and International Union of Bricklayers and Allied Craftsmen (Clark), unreported.

DECISION: 83-28

Crossley Karastan Carpet Mills Limited AND Canadian Brotherhood of Railway, Transport and General Workers.

Milton J. Veniot, Chairman; D. A. Nichols, Kenneth Hennick

George Boudreau, for the union
James C. Leefe, Q.C., Malcolm MacLeod, for the employer
March 3, 1983

ISSUE: Notice of Lay-off 6:2320, 2:1425; Delay 2:3210; Time Limits 2:3128; Policy grievances 2:3124.

CIRCUMSTANCES: The collective agreement specificies the employer must give the union two weeks written notice of lay-offs. An initial written notice dated August 28, 1981 was sent to the union for a lay-off effective September 11, 1981. A letter on September 10 gave clarification as to how many were to be laid off (56), and states lay-offs would begin September 11. It is noted that the singular 'lay-off' is used in the August 28 letter but 'lay-offs' on September 10. Subsequent to September 11 a number of lay-offs occurred, none of which were preceded by a written notice. The union claims this is a violation of the agreement as each lay-off requires written notice, and so grieved on a policy basis due to the differing interpretations of the lay-off clause.

The employer says the August 28 letter covered all impending lay-offs, not just the one on September 11. They also claim the union's position is not a timely one; however as they continued to process the grievance even though time limits were breached, they waived their right to object. The employer said the doctrine of laches applied because the union was slow to bring the matter to arbitration. The board found the delay was not inordinate and dismissed the laches argument. Finally, the employer returned to the original argument that the August 28 letter was in fact notice for all future lay-offs which were a continuing series of transactions. The union's rebuttal is that all previous lay-offs were preceded by written notice and that is the required practice. The union also asks that all employees be compensated for improper lay-off.

AWARD: The grievance succeeds. The employer should and could have given the union written notice of each and all lay-offs. As to the remedy, the employer is required to give the union notice of lay-offs, not each employee. It was not established that any employee suffered unduly because of lack of written notice, so no compensation is awarded.

DISSENT: Nichols felt the employer's initial notice of lay-offs was also valid for those which followed, and had met the requirements of the collective agreement.

DECISION: 83-29

O'Malley Electric (Construction Association Management Labour Bureau Limited) AND International Brotherhood of Electrical Workers, Local 625.

R. Lorne MacDougall, Q.C., Arbitrator

G. J. McConnell, for the union
Hugh A. R. Simpson, for the employer
March 7, 1983

ISSUE: The Object of Construction: The Intention of the Parties 4:2100; Lay-off 6:2200.

CIRCUMSTANCES: The grievor was laid-off and claimed that as he was job steward he had the right to be the next to last man laid-off. The employer said they had never recognized him as job steward because he was not a regular employee, so he had no right to be kept on ahead of others.

The question is whether workers such as the grievor who are employed for specific jobs can be considered 'regular' employees, or if only those working on a permanent basis for a specific company are 'regular' employees. The union argues that most companies in the employers association do not have permanent employees, hiring only on a job basis, and a job steward is chosen from among those particular workers. This practice should be permissible in all situations as otherwise it would exclude non-permanent employees. The employee argues that the collective agreement specifies 'regular' employees and this means permanent employees. They wanted one of their 'regular' employees to be job steward with the result that none of their permanent workers would be laid-off before a transient worker.

AWARD: The agreement specifies a job steward is to be chosen from the 'regular' employees where applicable; this implies that at times it is not possible to do so. The two kinds of employees are permanent and non-permanent and the arbitrator agrees with the employer's interpretation of 'regular' as meaning permanent. The grievance fails.

DECISION: 83-30

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

Ronald Pink, for the union
V. A. Pylychuk, for the employer
March 3, 1983

ISSUE: Burden of proof 7:2300; Incompetance 7:3510; Standard of review of disciplinary action 7:5020

CIRCUMSTANCES: The grievor was a probationary employee being trained as a postal coder. The requirements for this job were to attain a minimum of 1000 six-digit postal codes per hour with 99% accuracy at the conclusion of 80 hours training. The grievor failed to meet the standard and was given notice of termination. She feels that because she was left handed, but trained right handed, there should be flexibility regarding the application of the standard to her as she barely fell below to 980 letters per hour with an accuracy of 98.57%. She also claims she was treated callously by her supervisor and the machine she used for practice and testing was defective.

In response the employer indicated the grievor had been given the chance to train left handed and had not accepted the offer, and that most left handed people who trained right handed passed the test. Time lost because of a defective machine was allowed to be added to the overall training period. There was a question of the burden of proof regarding sufficient and adequate training as it related to the grievor's being left handed.

AWARD: The burdon of proof concerning qualifications is clearly on the employer as stated in the collective agreement, and the arbitrator found the employer's standards to be acceptable. As the grievor did not meet these standards, her termination was justified, and her objections that being left handed should have allowed her special consideration was not reasonable. The grievance fails.

AUTHORITIES: Air Canada (1979), 23 L.A.C. (2d) 241; Board of Education for the Bourough of Scarborough (1980), 26 L.A.C. (2d) 160 (M.G. Picher, Chairman).

DECISION: 83-31

Crossly Karastan Carpet Mills Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

N. M. Scaravelli, Arbitrator

J. G. Boudreau, for the union
Paul R. Richter, for the employer
March 15, 1983

ISSUE: Time limits 2:3128; Delay 2:3210; Preliminary objections 3:2100; Job posting 5:2520; Rights of recall 6:2354; Senior employee with the required ability 6:3210

CIRCUMSTANCES: The grievor was laid-off as beamer-tufter operator and recalled six months later. Several weeks after the lay-off, a job as beamer-tufter operator became available and the grievor claims he should have been recalled then and offered the position because of his seniority. The employer had several preliminary objections, the first being the grievance was untimely as the grievance had to be filed within 5 days of the job posting. As the grievor was laid-off and had no knowledge of the posting, this was not possible, and the arbitrator accepted that the notice of grievance filed within 5 days of his becoming aware of the situation was correct. The second objection was that the grievance had been previously grieved and settled. The arbitrator did not agree as the grievance referred to involved different employees. Lastly the employer claims that undue delay prevents them from presenting a proper case as many witnesses are no longer available for questioning. Again the argument is dismissed as the grievor has a right to have his case heard as he had acted properly as to the procedure of the grievance, and the unavailability of any witnesses is not his fault. The employer then argued that the grievor had been recalled in December but declined the offer as he wished to complete a 6 week course already begun. The grievor said the offer was for a temporary job as a service operator and at a lower rate of pay, and he declined only when the employer had made it clear that he would not lose seniority or a chance at other jobs. He would have returned if the job had been as a beamer-tufter operator, even on a temporary basis.

AWARD: The grievance succeeds. The employer should have recalled the grievor as soon as the job as beamer-tufter operator became available. The grievor had indicated that he was always available for that position and would have returned at any time, and the company should have followed through when they indicated that it was acceptable for employees to decline certain recalls and still remain eligible for other jobs.

DECISION: 83-32

Huyck Canada Limited AND United Textile Workers of America, Local 486

Eric G. DeMont, Q.C., Chairman; A. Boyd MacGillivray, Q.C.; Eric Durnford

Ron Myslowka, for the union
A. P. Tatasuk, for the employer
February 11, 1983

ISSUE: Waiver of procedural irregularities 2:3130; Proceedings prior to arbitration 7:2100; Notification of absence 7:3110; Reasonable explanation of absence 7:3112.

CIRCUMSTANCES: The grievor was a full-time worker who was laid-off and notified the employer he would be available for full or part-time recall. After one such period of recall, the supervisor told employees they would be needed for the next two working days and possibly the third. The grievor claims he was not present to hear this but the supervisor says he was. When the grievor did not show up for these shifts, the employer tried to contact him and after failing to do so, sent him a notice of termination. The reason the grievor couldn't be reached was that he was working elsewhere. The employer said that as the grievor had absented himself without sufficient cause or notification, the termination was justified. The grievor said he didn't show up because he didn't know about the work, and if he had known he would have been there. One of the office personnel had seen the grievor outside of work and they had a discussion about his being required back at work, and the grievor indicated a conflict with his other job. Evidence from this other employer showed the grievor knew he would be involved there a minimum of 5 days, thus preventing him from working the three days as requested by the employer. The grievor also claimed the procedure of dismissal was improper in that he should have received a hearing before termination.

AWARD: The Board found the grievor voluntarily absented himself from work without permission of the employer, and without sufficient reason, which in turn justifies termination. The procedure regarding dismissal was correct and as there had been no procedural objections at the beginning of the hearing, the union was seen to have waived its right to do so now. Furthermore, the hearing procedure refers to disciplinary discharges and the Board did not see this dismissal as being disciplinary.

DISSENT: MacGillivray disagreed as he felt the grievor did have a right to a hearing before dismissal as it was a disciplinary discharge.

AUTHORITIES: Canadian General Electric Co. v. Oil, Chemical and Atomic Workers International Union, Local 9-832 (1975), 11 N.S.R. (2d) 550.

DECISION: 83-33

The Children's Aid Society of Cape Breton AND Canadian Union of Public Employees, Local 3010

S. Bruce Outhouse, Chairman; Johanna Oosterveld, Robin Campbell

Gerald Yetman, for the union
Bernard Boudreau, for the employer
March 22, 1983

ISSUE: Past practice 3:4430; Interpretation of collective agreement 4:2100; Pregnancy - vacation benefits 8:3250

CIRCUMSTANCES: The question is whether vacation benefits accrue while an employee is on unpaid maternity leave. The grievor was told her vacation entitlement would be reduced in proportion to the time she was absent on leave. The union claimed this was contrary to the collective agreement as entitlement depends on length of employment and seniority, which continue during authorized leaves of absence. The employer claims vacation entitlement is earned as a result of actual time spent working. Past practice shows employees on maternity leave did accumulate vacation time.

AWARD: The grievor is entitled to full vacation time. Although the collective agreement is ambiguous as to whether vacation benefits result from, a) actual time worked or, b) time as an employee, past practice is the deciding factor. As the employer has never denied these benefits previously, it would be inappropriate to do so now.

AUTHORITIES: Air Canada and Canadian Airline Employees Association (1976), 13 L.A.C. (2d) 225 (Brown); Nurses' Association and St. Mary's General Hospital, Kitchener (1972), 24 L.A.C. 307 (O'Shea); Canadian Union of Public Employees, Local 1431 and Public Service Commission of Halifax (1982), unreported (Outhouse); Catholic Children's Aid Society of Metropolitan Toronto and Federation of Children's Aid Staffs (1975), 9 L.A.C. (2d) 374 (Weatherhill).

DECISION: 83-34

Hawker Siddeley Canada Inc. AND United Steelworkers of America, Local 1231.

Judge J. A. MacLellan, Arbitrator

Bob Young, for the union
J. M. Howatson, for the employer
March 23, 1983

ISSUE: Status of persons on lay-off 6:2352; Qualifying for holiday pay 8:3120; Absence caused by lay-off 8:3122

CIRCUMSTANCES: The grievance concerns interpretation of the collective agreement as it relates to holiday pay. The grievor had worked sporadically for the employer throughout October and December and was recalled again on December 21. He worked 6 hours and expecteed to be paid for the three holidays around Christmas. The agreement states that holiday pay is to be given if an employee is laid-off 5 days before the holiday. The employer says that as the grievor worked only 6 hours, which is only a portion of the shift, he does not meet the specifications and regardless it only applies to employees who had worked continuously up to the lay-off. The union interprets the agreement as not putting any restrictions on how much work was done, rather to have done any work at all qualifies the employee for holiday pay. Two other employees in the same situation also did not receive holiday pay, nor did they expect it as this had not been the company's practice previously.

AWARD: The grievance succeeds and the grievor is to be paid for the three holidays. The holiday pay clause clearly applies to the grievor and makes no restrictions as to length of time worked or continuous employment.

DECISION: 83-35

North Sydney Marine Railway Company Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 230(b).

Robert F. Ferguson, Arbitrator

Thomas Barron, for the union
Brian Johnston, for the employer
March 20, 1983

ISSUE: Grounds for Discipline - Alcoholic Beverages 7:3560; Disciplinary Penalties - The Doctrine of the Culminating Incident 7:4310.

CIRCUMSTANCES: The grievor grieved the termination of his employment following an incident where he was accused of being intoxicated on the job. In the letter confirming the verbal dismissal, the employer cited admitted drinking during the working day, unexcused absence the working day following the incident, abuse of time-keeping requirements and past employment record.

The grievor denied being intoxicated and maintained that dismissal was too severe a penalty.

AWARD: The grievance fails. The Arbitrator accepted the evidence of the witnesses that the grievor was intoxicated on the date in question and cited authorities indicating that the behaviour warranted disciplinary action. He also affirmed that he was within his mandate to substitute the penalty if so dictated by the facts.

The Arbitrator agreed with the employer that the doctrine of the culminating incident applied since the grievor was told in the dismissal interview that his past employment record was not satisfactory so that the citation of it in the dismissal letter was not unexpected.

Substitution of penalty was not warranted because of the grievor's past record and the seriousness of the offense.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 339; Palmer: Collective Agreement Arbitration in Canada, p. 293; Northwood Pulp & Timper Ltd. and Canadian Paperworkers Union Local 603 (1974), 7 L.A.C. 2(d) 248; Re: Corporation of the City of Stratford and CUPE Local 1385 14 L.A.C. (2d) 86; Re: Canadian Luckens Ltd. & United Steelworkers of America 12 L.A.C. (2d) 440.

DECISION: 83-36

The Town of Trenton AND The Trenton Police Association

R. Lorne MacDougall, Q.C., Chairman; Walter Duggan; Charles A. MacDougall

Bruce Evans, for the union
Robert Stroud, for the employer
March 17, 1983

ISSUE: Seniority - The Skill and Ability Requirement - The Scope of Arbitral Review 6:3100; Seniority - The Skill and Ability Requirement - Senior Employee with the Required Ability 6:3210; Interpretation of Collective Agreement - The Object of Construction: Intention of the Parties 4:2100; Distribution of Work within the Bargaining Unit - Procedural Requirements 5:2500.

CIRCUMSTANCES: The grievor disputed the promotion of a police officer with less seniority to a position for which he had applied. He maintained that he was qualified for the position, having, on occasion, already performed the responsibilities, and referred to the Collective Agreement and to a prior appointment in which seniority was cited as the deciding factor.

The Employer raised two preliminary objections, maintaining that the time limit imposed by the Collective Agreement was past and that the grievance had not been carried forward by the Executive-Director of the Union as stipulated in the Agreement. The former objection was dropped.

Evidence of the witnesses was detailed, with many witnesses stating that they felt that the better man had received the promotion.

AWARD: The preliminary objections were not sustained. The language in the Collective Agreement with regard to time limitations in filing documents was directory and not mandatory. According to the Collective Agreement, a grievance could be carried forward by the Executive-Director or on his behalf. Although the grievor carried his own grievance forward, he did so with the full knowledge of the Executive-Director. The Board found this action to be on behalf of the Executive-Director.

The grievance succeeds in part. The Board interpreted the relevant sections of the Collective Agreement to place the emphasis on seniority, the senior applicant getting the position, providing he has the ability. Although the Board understood the Chief's feelings in wanting the best man for the job, they felt that the grievor had the qualifications and the ability for the position in dispute. Examining the provisions of the Collective Agreement further, the Board found that proper procedure had not been followed in filling the position. The matter was referred back to the Employer for a fresh determination based on the standards and terms of the Collective Agreement.

DISSENT: MacDougall found that the Employer violated the Collective Agreement in not giving the grievor the position. He submitted that the grievor be given the job under the terms of the Collective Agreement.

AUTHORITIES: Canadian Union of Public Employees, Local 1047, C.L.C. v. Colchester-East Hants Amalgamated School Board, (1980) 40 N.S.R. (2d); Brown and Beatty: Canadian Labour Arbitration, pp. 254, 261; General Freezer and United Steelworkers, Local 7455, (1974) 6 L.A.C. (2d) 296; Re: Douglas Aircraft Co. of Canada Ltd. and U.A.W. Local 673, (1971) 22 L.A.C. (2d) 208.

DECISION: 83-37

Volvo Canada Ltd. AND International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 702.

Judge J. A. MacLellan, Arbitrator

Larry Sheffe, for the union
John Merrick, for the employer
March 29, 1983

ISSUE: The Power to Discipline - Where the Agreement is Silent 7:1200; Grounds for Discipline - Carelessness 7:3520; Penalties for Work Related Misconduct - Warnings, Suspension, Discharge 7:3542.

CIRCUMSTANCES: A complaint about the unsafe driving of one of its employees was sent to the Employer after an observer in the area saw one of the company trucks driving too quickly for conditions on the waterfront and forcing another truck to stop when it should have been given the right-of-way. The Company was concerned about the incident because it had received special permission to drive its large truck (85 feel overall length) a certain route and did not want to jeopardize this permission. As well the Company is safety conscious, stressing the safety of its cars, so that it would not want a company vehicle involved in an accident. They also viewed seriously any conduct that could injure a person. After ascertaining from the time logs that the grievor was the driver involved, the Company suspended him for two days.

The grievor alleged that the Company had no grounds for the suspension. He relied on his accident-free record during the eight years he had driven for the Company and on the fact that he had received no written warning from his employer. It was argued that the person registering the complaint was not an expert in judging the speed of vehicles and had no experience in traffic control.

The Company pointed out that the grievor had been previously warned orally about his driving and that the complainant was familiar with large trucks.

AWARD: The grievance fails. The arbitrator accepted the opinion of the complainant, based on his long-term familiarity with trucks. He pointed out that it is possible to be driving in a manner too dangerous for conditions without exceeding the speed limit. He supported the Company's right to discipline in this incident and found the penalty reasonable in the light of Company rules. Note was made that the Collective Agreement provides for the cancellation of the record of a disciplinary suspension after twelve months.

DECISION: 83-38

Twin Oaks Memorial Hospital AND Twin Oaks Memorial Hospital Local of the Nova Scotia Nurses Union

Innis Christie, Chairman; Donald H. McDougall, Raymond F. Larkin

David P. Reynolds, for the union
Eric P. Durnford and Sara Filbee, for the employer
January 24, 1983

ISSUE: Compensation - Entitlement to Wages 8:1000; Distribution of Work Within the Bargaining Unit - Criteria: Equal Work or Equal Skill 5:2420.

CIRCUMSTANCES: Following an arbitration Award (82-88), the Board directed the Employer to reconsider placement on the salary scale of seven employees, based on their recent "satisfactory" nursing experience. The Board indicted that the Employer was to decide what was satisfactory with the caveat that it act in good faith, take into account relevant considerations, not take into account irrelevant consideration and not make a decision 'so unreasonable that no reasonable authority could ever have come to it'.

The Employer subsequently established a formula for determining whether experience was satisfactory. Percentage values were assigned to various types of experience, based on the percentage of types of nursing done at the hospital. Therefore only experience corresponding to the nursing done at this hospital was "satisfactory". In this way only a portion of experience may have been considered satisfactory.

The Union, on behalf of three grievors who received no increase in salary under the scheme, submitted that previous experience could not be segmented but had to be assessed as a whole as to whether it was satisfactory or not. Alternatively, Counsel argued that the formula failed to recognize overlap in certain skills, thereby failing to take into account relivant considerations.

AWARD: The grievance fails. Considered in the context of the facts to which the article in question was intended to apply, the words "years of satisfactory recent nursing experience" could be interpreted to refer to cumulated experience. Therefore experience could be partly "satisfactory". The Board also found that the Employer did not act in bad faith or took into account irrelevant considerations. They would not interfere with the Employer's judgement on which experience was relevant.

AUTHORITIES: Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223.

DECISION: 83-39

City of Dartmouth AND Nova Scotia Union of Public Employees, Unit #1.

S. Bruce Outhouse, Chairman; David P. Reynolds; Eric B. Durnford

Howard Epstein, for the union
Michael Moreash, for the employer
March 31, 1983

ISSUE: Compensation - Entitlement to Wages 8:1000; Jurisdiction of the Arbitrator - Secondary Sources - Applications of Promissory Estoppel 2:2220; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100.

CIRCUMSTANCES: For a number of years, the janitors at City Hall had been excluded from the Bargaining Unit by both the Union and the City. The present agreement was also negotiated without consideration of the janitors. Subsequently, however, the Union notified the City that the janitors should be classified under the article of the Agreement stating that all employees covered by the Certification Order be classified according to the specified classifications. The Union suggested the classification of "labourer" since it was lowest on the pay scale. The Employer did not agree with the classification, feeling it to be too high.

However, during a period of four to six weeks, the janitors were paid according to the labourers' scale and Union dues were deducted. This decision was subsequently reversed although Union dues continuted to be deducted. A grievance was filed.

The Union contended that the Article in question in plain language obliged the Employer to place the janitors in one of the existing classifications, as listed in the schedule referred to.

Alternately, the Union argued estoppel. Because the Employer already classified and paid the janitors as labourers, it is precluded from denying them that status under the Collective Agreement.

The Employer interpreted the Article in question merely as preventing it from unilaterally creating new classifications. Therefore a new classification had to have unilateral consent.

The Employer also relied on the doctrine of estoppel. Because the Union had never raised the rights of the janitors at the Bargaining Table, it was precluded from insisting on a strict interpretation of the Article while the Agreement was in force.

AWARD: The grievance succeeds. The Board agreed that all employees covered by the Certification Order be classified under one of the classifications listed in the agreement, according to the wording of the relevant Article. Nowhere in the Agreement was there reference to new classifications. This is explained by the Article in question which, on plain reading, obviates the necessity to create new classifications during the term of the Agreement.

The estoppel on which the Employer argued detrimental reliance was terminated by appropriate notice from the Union in its letters. The Employer's conduct indicated consent to the Union's request. Any alleged estoppel ceased to exist at the moment the Employer accepted the notice.

The cut-off date for back wages was the date when the Employer ceased paying the janitors at the labourer's rate. The janitors were to be classified as labourers.

DISSENT: (Durnford) Establishing classifications in Collective Agreements is a matter of negotiation for the parties and the effect of the Article in question was to make newly recognized positions a matter of negotiation. In the absence of agreement the Board has no jurisdiction to impose a classification upon the parties.

Where giving effect to the words of a Collective Agreement according to their plain and ordinary meaning would lead to an absurdity in the rest of the Agreement, Boards have interpreted the words in order to reconcile the intent. The specificity of the classifications outlined in the Agreement indicates the detail in which the negotiating parties considered the issue and to equate janitors with labourers is absurd. Therefore a new classification should be negotiated.

In several authorities, the party was held to be estopped for the life of the Collective Agreement. Until it expired, the detrimental reliance of the other party could not be considered to be spent or cured. Here the Employer relied to its detriment on the acquiescence of the Union in the treatment of the janitors and notice by the Union to change the situation was not sufficient to spend the estoppel and end the prejudice. It continues until the expiration of the Agreement, at which time new classifications could be negotiated.

AUTHORITIES: Re: Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911 (1974), 7 L.A.C. (2d) 380 (Adams); Brown and Beatty: Canadian Labour Arbitration (1977), pp. 405, 69; Re: C.N./C.P. Telecommunications and Canadian Telecommunications Union (1981), 4 L.A.C. (3d) 205 (Beatty); Re: Hydro Electric Power Commission of Ontario and Canadian Union of Public Employees, Local 1000 (1982), 4 L.A.C. (3d) 216 (Ianni); Re: Ex-Cell-O Corporation of Canada Limited (1975), 8 L.A.C. (2d) 248; Re: Sterling Action and Keys Company Limited (Brantford) (1951), 3 L.A.C. 817; Re: Fittings Limited (1967), 18 L.A.C. 391; Re: City of Edmonton (1972) 1 L.A.C. (2d) 369; Re: Sault Structural Steel (1959), 9 L.A.C. 348; Re: Globe and Mail Limited (1974), 6 L.A.C. (2d) 70; Re: Westclox Canada (1981), 3 L.A.C. (3d) 68 (Beatty); Re: Westroc Industries (1973), 3 L.A.C. (2d) 102; Re: Barber-Ellis of Canada Limited (1976), 11 L.A.C. (2d) 280; Re: Canadian Industries (1974), 7 L.A.C. (2d) 110; Re: C.G.E. Company (1964), 5 L.A.C. 1644.

DECISION: 83:40

MacIntyre Chevrolet, Oldsmobile Ltd. AND C.B.R.T. & G.W., Local 506.

Judge R. F. Ferguson, Arbitrator

Thomas Barron, for the union
Angus MacIntyre, for the employer
March 29, 1983

ISSUE: Fighting, Assault 7:3430; Insolent unco-operative behaviour, obscene language 7:3660; Scope of review 7:4100.

CIRCUMSTANCES: The grievor, an automotive mechanic, was criticized by his superior, the service manager, for spending too much time on a particular job. In response, the grievor verbally abused the service manager, pushed him several times, and challenged him to a fight. The grievor was dismissed the following day. The union now argued that under the circumstances discharge was too harsh a penalty.

AWARD: The grievance succeeds. The grievor's conduct merited some type of disciplinary action but, in light of several factors including his spotless record, his age (51) and years of service (13) with the company, dismissal was too harsh a penalty. The arbitrator believed that he had the power to substitute a penalty for that given by the company, even though it may be argued that the employer had not acted in an arbitrary, discriminatory, or unreasonable manner. Thus, the discharge is set aside and a four month suspension substituted, reinstatement being conditional upon the grievor offering a full and complete apology to the service manager.

AUTHORITIES: Northwood Pulp & Timber Ltd. and Canadian Paperworkers Union, Local 603, (1974) 7 L.A.C. (2d) 244; Re: Spruce Falls Power and Paper Co. Ltd. & Lumber and Sawmill Workers Union, Local 2992 (1971) 22 L.A.C. 406; Re: Dominion Glass Co. and United Glass & Ceramic Workers, Local 203, (1975) 11 L.A.C. (2d) 84; Re: Canadian Carborundum and United Steel Workers, Local 4151 (1973) 5 L.A.C. (2d) 391.

DECISION: 83-41

The Valley Health Services Association AND The Nova Scotia Nurses' Union, Kentville Hospital Local.

S. Bruce Outhouse, Chairman; Reymond F. Larkin, John P. Merrick, Q.C.

David P. Reynolds, for the union
Eric P. Durnford, for the employer
April 6, 1983

ISSUE: Aids to interpretation of collective agreement 4:2200; Alteration of wages 8:1400.

CIRCUMSTANCES: The union brought a policy grievance against the employer's interpretation of "yearly rate of pay" in relation to the amount of biweekly earnings. The union argued that the yearly rate of pay is referable to a period of 52 weeks or 2080 hours of work per year (52 weeks times 40 hours per week). Therefore, each employee is entitled to 1/26 of his or her yearly rate of pay every two weeks. In support, the union pointed out, inter alia, that the collective agreement specified 2080 hours in its determination of hourly rates. Further, the employer had in the past paid employees 1/26 of their yearly rate every two weeks.

The employer contended that the yearly rate of pay is referable to a full calendar year of 52 weeks plus one day or 2088 hours of work per year. Therefore, employees are entitled to a little less than 1/26 of their yearly salaries every two weeks. The fact that the employer had not followed this practice in the past was due to the employer's error, and in fact resulted in an overpayment to employees.

AWARD: The grievance succeeds for several reasons. First, in common usage and understanding annual rates of pay or yearly rates of pay are synonymous with 52 weeks of pay. Second, the collective agreement refers in places to 2080 hours, not 2088 hours. Third, past case law suggests that in collective agreements yearly rates of pay are referable to a 52 week period rather than to a full calendar year. Finally, even if the above reasons are mistaken, the pay provisions of the collective agreement were sufficiently uncertain in their application to justify resort to past practice as an aid to interpretation, and the past practice was to pay 1/26 of the yearly salary every two weeks.

AUTHORITIES: Re: Lynwood and Norwood Auxiliary Hospitals and Canadian Union of Public Employees, Locals 1043 and 1158, (1973) 2 L.A.C. (2d) 337.

DECISION: 83-42

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

D. W. Tingley, for the union
V. A. Pylypchuk, for the employer
April 11, 1983

ISSUE: Jurisdiction: Form of grievance 2:3122; Policy grievances 2:3124; Abandonment, settlement and withdrawal of grievances 2:3230; Vacancies 5:2510.

CIRCUMSTANCES: The union grieved the employer's method of filling job vacancies. The collective agreement said that "the employer shall fill vacant positions as they occur ..." A set of geographical priorities was applied to applications from other postal stations for the filling of vacancies. The union argued that the employer was obligated to consider all applications received or submitted by the actual date of vacancy. The employer countered by asserting that it was unreasonable to be forced to wait until the actual date of vacancy before it could make an offer to the applicant; rather, it should be allowed to make offers to applicants for the anticipated vacancy anytime before, during, or after the actual date of vacancy.

The employer also raised a preliminary objection: since the particular employee at the heart of this grievance had eventually been given the position that he was seeking, there was nothing left to arbitrate. And if the union now wished to bring a "collective" rather than "individual" grievance, it had not followed the proper procedure.

AWARD: The arbitrator ruled that he had jurisdiction. He dismissed the preliminary objection on the grounds that (1) the employer had not been adversely affected by the fact that the present grievance was in fact "collective" rather that "individual"; and second, even if this was an individual grievance, the individual still has the right to adjudication of the alleged breach of the collective agreement.

As to the merits, the grievance succeeds. Interpretation of the relevant provisions and definitions in the collective agreement leads to the conclusion that the position was not "vacant" until the employee's last day at work. Thus, the employer should have proceeded to fill the job on the basis of application forms in hand on the day the vacancy occurred. The arbitrator declined, however, to rule on the effect of the collective agreement in a case where the employer had decided not to fill the position or where the employer had left the matter to be decided after the vacancy occurred.

AUTHORITIES: International Nickel Co. of Canada Limited (1972) 24 L.A.C. 51; Steel Company of Canada and USW (1971) unreported; Re: Imperial Tobacco Products (Ont) Ltd. & Tobacco Workers' International Union, Local 323, (1975) 8 L.A.C. (2d) 388; Re: International Nickel Co. of Canada Limited & United Steelworkers, Local 6500, (1975) 9 L.A.C. (2d) 83; Canadian Union of Postal Workers and Canada Post Corporation (1983, Outhouse, unreported); Union Gas Co. of Canada Limited (1973), 4 L.A.C. (2d) 132; Misawa Homes Limited (1974), 5 L.A.C. (2d) 113; Capital Coach Lines Co. (1974), 8 L.A.C. (2d) 355; Toronto Hydro-Electric Systems (1976), 12 L.A.C. (2d) 201; Air Canada (1975), 8 L.A.C. (2d) 239; Re: Oil, Chemical & Atomic Workers (1963), 14 L.A.C. 233; Re: UAW and Kysor of Ridgetown Ltd. (1967), 18 L.A.C. 63; Re: Horton Steel Work Ltd. & U.S.W., Local 3598 (1973) 3 L.A.C. (2d) 54; Re: Polymer Corp. Ltd. (1974), 5 L.A.C. (2d) 344; Re: Toronto Electric Commissioners and C.U.P.E., Local 1 (1974) 6 L.A.C. (2d) 243; Toronto Star Ltd. (1976) 12 L.A.C. (2d) 397; Nabob Foods Ltd. (1982) 2 L.A.C. (3d) 353; Ottawa-Cornwall Broadcasting Ltd. (1982), 4 L.A.C. (3d) 283.

DECISION: 83-43

The Town of Kentville **AND** The Kentville Police Association, Local 107 of the Police Association of Nova Scotia.

S. Bruce Outhouse, Chairman; Charles McDougall; Matthew J. McPherson

Bruce W. Evans, for the union
Alan T. Tuffs, for the employer
April 8, 1983

ISSUE: Holiday pay: Payment for holidays falling on non-working days 8:3110.

CIRCUMSTANCES: The collective agreement stated that if a statutory holiday falls upon an employee's day off, then he has the right to elect either to take an extra 12 hours of pay or to take off another shift in lieu thereof. The agreement later stated that the employer shall not reschedule an employee's hours or schedule time off for the purpose of avoiding the payment of overtime. The practice was for the employee to submit a written memo to the Chief of Police requesting the particular day he wished to take off in lieu of a statutory holiday. Ordinarily, these requests are granted without any problem. This grievance arose when the Chief denied the grievor's request for a particular date on the basis that the employer would incur overtime.

The Association argued that while the employer has a discretion to grant or deny requests for specific days off in lieu of statutory holidays, that discretion cannot be exercised in an unfair, arbitrary or discriminatory fashion. Furthermore, the employer has violated the collective agreement which forbids the use of avoidance of overtime as the determining factor in exercising his discretion.

The employer in turn argued that under the collective agreement it had an unfettered discretion in its determination of the day the employee is entitled to take off in lieu of a statutory holiday. The later section dealing with overtime had no application here.

AWARD: The grievance fails. There was no evidence of discrimination against the grievor. The real issue was whether the Chief must not consider overtime in exercising his discretion. The board agreed with the employer that the purpose of the prohibition in the later section was to forbid the employer from juggling an established work schedule to avoid payment of overtime. Here, it was the grievor who wished to alter the work schedule, not the employer. The employer has a legitimate interest in establishing and maintaining a work schedule which avoided unnecessary overtime.

DISSENT: MacDougall felt the collective agreement placed the choice of day off in the hands of the employee. Nowhere in the article does the Chief have the power to ratify that choice.

DECISION: 83-44

Joneljim Concrete Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 1588.

F. B. William Kelly, Arbitrator

Gerald J. McConnell, for the union
Frank Elman, Q.C., for the employer
April 28, 1983

ISSUE: Interpretation of collective agreement: Dictionaries 4:2210; Travel allowance 8:3700.

CIRCUMSTANCES: Two different grievances were heard.

(1) The collective agreement defined "industrial projects" as including "construction on ... mine construction". Further, "new work that would increase the production by modernizing the plant(s) or project(s) would be under the terms of the Industrial Agreement". A mining operation switched from "room and pillar" to "longwall" mining, a more efficient method of mining that necessitated significant changes in the buildings and equipment at the surface. Two aspects of this reconstruction were the construction of a building to house a new conveyor drive belt system and a funnel arch structure. The issue was whether employees working on these projects should be paid under industrial or commercial rates; that is, whether the reconstruction of surface buildings was included under "mine construction". The employer argued that the reconstruction was simply replacement or maintenance in nature.

AWARD: The grievance succeeds. After criticizing the drafting of the agreement, the arbitrator gave the phrasing its grammatical or dictionary meaning. The use of the word "construction" in the phase "mine construction" suggested something more than the original project, and would seem to include as "construction" a structure such as a significant alteration of the original project. The two projects here were part of an overall integrated project of mine expansion and thus fell under "mine construction". Further, the project as a whole fell under the clause "new work that would increase the production by moderinizing the plant".

(2) The second grievance concerned travel benefits. The union alleged that the employer had unilaterally altered travel benefits in violation of the collective agreement. Instead of giving employees who lived more than 28 miles from work a specified additional amount per day, the employer gave several employees a company truck to use to get to work.

AWARD: No award was made because there was no evidence and no request for a remedy in this nature by the employees or the union. The employer's unilateral alteration of travel benefits was a breach of the collective agreement, even though the employees may have benefited more by the alteration because the truck was also available for their private use.

AUTHORITIES: Re: Massey-Harris 4 L.A.C. 1579; Webster's Third New Int'l Dictionary.

DECISION: 83-45

Industrial Electrics Ltd. AND International Brotherhood of Electrical Workers, Local Union No. 625.

Judge J. A. MacLellan, Arbitrator

Gerald McConnell, for the union
Eric Durnford, for the employer
April 29, 1983

ISSUE: Union security 9:1200; Amendments 4:1300; Retroactivity 4:1610; Extrinsic evidence 4:2250; Assignment of bargaining unit work to non-unit employees 5:1400.

CIRCUMSTANCES: The union is grieving the use of non-union on one specific job. For some time preceding the grievance, the employer and the union were involved in trying to establish a Voluntary Recognition Agreement, which they eventually did. One of the areas of dispute was whether the Labour Bureau Agreement was in effect during the completion of that job. Correspondence from both sides was submitted as evidence, with the employer claiming it supported their position that the Labour Bureau Agreement did not affect the non-union personnel working on the job in question. The final piece of correspondence from counsel for the union indicates their agreeing to the employer's amendments on this issue. The union claims the Labour Bureau Agreement did apply to that job and it was always their intention that it should.

AWARD: The arbitrator, having considered all the correspondence, felt the union had agreed that the Voluntary Recognition Agreement would come into effect after the job was completed. The grievance fails.

DECISION: 83-46

The Town of Stellarton, a Municipal Body Corporate AND The Stellarton Police Association, Local 305.

R. Lorne MacDougall, Q.C., Chairman; Charles A. MacDougall, Walter Duggan.

Bruce W. Evans, for the union
John B. Baker, Q.C., for the employer
April 21, 1983

ISSUE: Temporary, casual and part-time employees 5:1124; Progressive wage increases 8:2320.

CIRCUMSTANCES: The grievor is a constable who was refused a reclassification from starting constable to 2nd class constable after his probationary period (6 months) was completed. He had worked 2080 hours which he considered the equivalent to one year of service and so qualified him for reclassification. Some of the hours had been accumulated while working on a part-time, temporary basis during six months prior to being hired full-time. The employer's position is that only full-time work is relevant for reclassification and the six months previous to full-time status cannot be taken into account.

AWARD: The arbitrator considered that as the grievor was employed throughout the six months prior to being taken on full-time, he was in fact employed for one year overall and therefore entitled to the reclassification at the end of his six month probationary period. He was to be compensated for any discrepancy between the two salaries.

DECISION: 83-47

Sydney Steel Corporation AND United Steelworkers of America, Local 6537.

R. Lorne MacDougall, Q.C., Arbitrator

Winston S. Ruck, for the union
Gregory I. North, for the employer
May 4, 1983

ISSUE: Distribution of work within the bargaining unit 5:2000; The requirements of bona fides 5:2300; Seniority - lay-off 6:2200; Bumping 6:2330; Trail, training and familiarization 6:3230.

CIRCUMSTANCES: There are three grievances, all to do with improper lay-off and seniority. Due to a plant lay-off, and as allowed by the collective agreement, some employees from the non-bargaining unit were moved into jobs held by bargaining unit employees who in turn were laid off. The primary consideration on management's side when deciding where to move employees was what training was required; they wanted them in jobs where little or no training was necessary.

Two of the grievances involved transferring non-bargaining unit workers whose previous jobs in the bargaining unit did not exist anymore; the jobs had been incorporated into new positions which also included additional responsibilities. Because of this the employer felt it would take too long to train them and chose to put them in jobs requiring less training. The result was senior employees being bumped while junior employees remained on the job. The union claims the company's estimate of training time was not accurate and that it would be the same for all the jobs in question, therefore senior employees should not have been bumped.

The third grievance differs in that the grievor was part of the bargaining unit and was trained to do several jobs within the unit. Previous to his transfer, another employee had bumped a janitor even though there was a more junior employee, a pay-roll clerk, who could have been bumped. When the grievor was transferred, the pay-roll position was the only one available and it paid less than the janitor's job. The grievor felt that if the first employee had been moved to pay-roll clerk he would have gotten the janitor's job thereby making more money. The employer's reason for not originally bumping the most junior employee, the pay-roll clerk, was because the first employee had never done that job and retraining would be too complicated. The union again claims the most junior employees should be bumped first, regardless of other considerations.

AWARD: The first two grievances succeed. As both non-bargaining unit employees had some previous training in two positions involving junior employees, they could have bumped them instead of the senior employees. The amount of retraining would not have been significant, and the agreement allows for a reasonable break-in or training period which in this case would not have been a burden on the employer.

The third grievance fails. The first employee had no training at all for the position of pay-roll clerk, and to train him would have required a significant effort on the part of management. The grievor did have experience in that position and could properly perform the duties involved without training. Therefore management was justified in the transfers.

DECISION: 83-48

Robb Engineering (AMCA Engineering) **AND** United Steel Workers of America, Local 4122.

R. Lorne MacDougall, Q.C., Arbitrator

W. A. Parsons, for the union
John P. Marrick, for the employer
May 9, 1983

ISSUE: Duty to mitigate 2:1412; Time limits 2:3128; Laches 2:3210; Preliminary objections 3:2100; Seniority - Acquisition and termination 6:1100.

CIRCUMSTANCES: The grievance concerns seniority. The employer had two preliminary objections, that of timeliness and that the grievor was guilty of laches. The grievor wants a seniority listing as Storeman as in 1977 he had put in the required time (50 days), filled in the application for seniority and had the forman sign it. However, the listing didn't appear in the next or subsequent seniority lists over the next 5 years. He did not grieve the oversight until the fall of 1982. The employer responded with records showing he had not worked the required 50 days. Their objection of timeliness relates to the agreement which states a grievance must be filed within 5 days of the event, which they see as the publication of the first relevant seniority list in 1977. As to the matter of laches, the grievor was a shop steward throughout this period and aware of all procedures involving seniority and grievances. Also, since six years had passed it is not possible for them to put their evidence together with any degree of certainty. The union says there is no time limit for applying for seniority, and that because the grievor filed a grievance within 5 days of the posting of 'a' (i.e. any) seniority list, the grievance is legitimate. Also, as the employer gave no notice that they intended to argue the doctrine of laches, their right to any such defense was waived.

AWARD: The arbitrator dismissed the objection of timeliness as both sides were unclear as to the dates the events took place. However, the doctrine of laches was deemed relevant as the delay had prejudiced the employer's preparation of the case. A key witness was no longer available to give evidence and another employee had been trained as Storeman and was satisfactory in the job. Regarding the merits of the grievance, the employer's accounting of the number of days the grievor worked as Storeman were found to be more accurate than the girevor's and since they numbered less than 50, he had not met the requirement for being placed on the Storeman seniority list. The grievance fails.

DECISION: 83-49

Brookfield Foods Limited **AND** Retail, Wholesale and Department Store Union, Local 1015.

Judge J. A. MacLellan, Arbitrator

Kenneth Henick, for the union
James Leefe, Q.C., for the employer
May 10, 1983

ISSUE: Temporary, casual or part-time employees 5:1124; Vacancy 5:2510; Management rights - Changes in job function 5:2410; Seniority - Lay-off 6:2200.

CIRCUMSTANCES: The grievor, a part-time employee, turned down a chance at a full-time job because it paid 94¢ an hour less than the job he held part-time. The position was made available when an employee on leave of absence did not return due to continuing illness. Some of the grievor's hours were spent filling in for that absent employee. When the grievor turned the position down, an employee with less seniority accepted it. This resulted in the grievor losing some of the part-time work he previously had, and eventually he was laid off. Another aspect of the grievance is whether a true vacancy occurred and was management correct in replacing the worker who was unable to return after a year's absence.

AWARD: Management has a right to determine if a vacancy exists and to act on this in a reasonable manner. As the original employee had been ill for over a year, the employer was justified in replacing her. As the grievor turned down the opportunity to apply for the position, his objections to a junior employee taking it were considered to be waived.

DECISION: 83-50

J. D. MacLean **AND** Labourers International Union of North America, Local 1115.

Charles O'Connell, Arbitrator

T. J. K. Gillis, Q.C., for the union
Victor Coffin, for the employer
May 13, 1983

ISSUE: Onus or Burden of Proof 3:2400; Term and Termination 4:1620; Temporary, Casual or Part-time Employees 5:1124; Contracting-out 5:1300.

CIRCUMSTANCES: On April 1, 1982 a new employer took over the company with a collective agreement in force until Aug. 22, 1982, which he continued to honour through Sept. 3. At this time he terminated two union employees and later re-hired them at lower wages. The union claims the agreement was still binding and the employees should have received the same wages as before. The employer argues that as the agreement was to run only until Aug. 22 it was not in force when the two employees were laid-off and re-hired. The union also asked for damages for work done by non-union members which they felt the employer contracted out. The employer said the work was done by casual employees for whom he was responsible, not a contractor, and their work was not normally done by union personnel.

AWARD: Because there was no notice that the employer considered the agreement terminated on Aug. 22 it was still binding, and the employees are to be reimbursed for lost wages. The onus is on the union to prove that the work performed by non-union was normally done by union employees. The union did not prove this and therefore no damages are awarded.

DECISION: 83-51

Nova Scotia Civil Service Commission AND the Nova Scotia Government Employees Union.

Innis Christie, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
April 20, 1983

ISSUE: Remedial Authority of the Arbitrator 2:1400; Abandonment, Settlement and Withdrawal 2:3230; Preliminary Objections 3:2100; Burden of Proof 3:2400; Leaves of Absence 9:1400.

CIRCUMSTANCES: The grievance involves the refusal of the employer to grant the grievor 4 days leave of absence without pay to attend a union related convention. The employer had two preliminary objections: a remedy was not possible as the time of the convention had passed, and the grievance had been settled by giving the grievor 2 days leave which signified her acceptance of a settlement. As to the merits, the employer claims they were in a position to decide if operational requirements could permit such a leave and did not feel she could be spared. The union argues there were others in the office who had filled in for the grievor previously and their workload was not so heavy they couldn't do it again.

AWARD: Both preliminary objections are dismissed. The grievance is not invalid because the requested time for leave had already passed, but has merit in principle as it was not the grievor's fault the appropriate remedy cannot be granted. The taking of 2 days leave does not imply the grievor viewed this as a settlement and she denied this was ever the case. The arbitrator agreed with the union that it would not have been a burden on the employer to grant 4 days leave as there was another employee available to do her job for that time period. The employer did not prove the contrary and the grievance succeeds.

AUTHORITIES: Canadian Union of Postal Workers and Canada Post Corporation (Cumberland Local Grievance) (1983 - Unreported); Canada Post (McEwan); New Brunswick Broadcasting Co. Limited (1982); Atlas Steel Ltd. (1974), 7 L.A.C. (2d) 24.

DECISION: 83-52

VS Services Limited AND Canadian Union of Public Employees, Local 2336.

S. Bruce Outhouse, Arbitrator

James Crosby, for the union
Alex Mielnik, for the employer
May 20, 1983

ISSUE: Theft 7:3316; Disciplinary Penalties - Scope of Review 7:4100; Disciplinary Penalties - Employment Record 7:4428.

CIRCUMSTANCES: The grievor is a general utility worker in a hospital kitchen. He planned to take a ham bone, which was to be thrown in the garbage, home for his dog. His supervisor asked him about this and the grievor explained what he was doing. The supervisor reminded him that it was against the rules to take anything at all from the kitchen and said not to do it again. The theft was then reported to the manager and the grievor was suspended for 6 months. The union feels this was excessive as the employee's work record was good, he had not attempted to hide what he was doing, and there was no value in the item taken. The employer argued that they could have dismissed him rather than just giving a suspension and that all employees knew the rules about removing anything from the kitchen, regardless of its value. There had been a problem with pilferage and the rule was felt to be necessary to control it.

AWARD: While the grievor was guilty of breaking the rules, his lack of concealment indicates that he did not intend to steal anything of value, but saw the bone as garbage and valueless to all but his dog. Because of this and his good work record, even though a substantial penalty is justified in cases of theft, the 6 months suspension is too severe and reduced to 3 months.

AUTHORITIES: United Automobile Workers, Local 200 and Ford Motor Company of Canada Limited (1970), 22 L.A.C. 35 (Weatherhill); Ford Motor Company of Canada Limited and United Automobile Workers, Local 1520 (1973), 3 L.A.C. (2d) 166 (Weatherhill); General Tubes Limited and United Steelworkers (1974), 6 L.A.C. (2d) 131; Northwood Pulp & Paper Limited and Canadian Paperworkers Union, Local 603 (1974), 7 L.A.C. (2d) 244 (Wilson); Toronto East General Hospital Inc. and Service Employees International Union (1975), 9 L.A.C. (2d) 311 (Beatty); Ontario Produce Company Limited and Warehousemen and Miscellaneous Drivers' Union, Local 419 (1976) 12 L.A.C. (2d) 235 (Shime); International Nickel Company of Canada Limited and United Steelworkers (1977) 15 L.A.C. (2d) 224 (Weatherhill); Air Canada and International Association of Machinists and Aerospace Workers, District Lodge 148 (1978), 18 L.A.C. (2d) 400 (Swan); Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979), 23 L.A.C. (2d) 227 (Arthurs); Brunn and Treasury Board (Post Office Dept.) (1980), 29 L.A.C. (2d) 103 (Kates); Carling O'Keefe Breweries of Canada Limited and Canadian Union of Brewery Workers, Local 325 (1982), 6 L.A.C. (3d) 412 (McLaren).

DECISION: 83-53

Halifax County-Bedford District School Board AND Nova Scotia Teachers Union.

Michael B. Sherar, Arbitrator

R. J. Downie, Q.C., for the union
Eric Durnford, for the employer
(no date given)

ISSUE: Notification of Absence 7:3110; Penalties for Work Related Misconduct 7:3542; Refusal to Follow Instructions 7:3610.

CIRCUMSTANCES: The grievor, a supervisor in the school system, is grieving a 5 day suspension for insubordination. The collective agreement states that supervisory personnel may be required to return to work early in the fall, before regular teachers, if judged necessary by the individual and his supervisor. When requested to do so the grievor did not feel it was necessary and neither reported for work nor gave notice of this intention. He was subsequently suspended, a rare occurance within the system. The grievor, while admitting his behavior was insubordinate, argues the suspension was unfair as the request to return to work early was not based on need but because of vindictiveness by his supervisor due to personal dislike, and would adversely affect his chances for promotion. The supervisor says there was work to be done and the grievor's actions were a deliberate thwarting of his authority.

AWARD: The arbitrator did not find the grievor's actions justifiable. The employer has a right to expect professional personnel to respond positively to work related requests and when this doesn't happen, disciplinary penalties, including suspension, are acceptable. The grievance fails.

AUTHORITIES: Mt. Sinai Hospital and Ontario Nurses Association, (1978) 17 L.A.C. (2d) 242; Fanshawe College and Ontario Public Service Employees Union, (1979) 12 L.A.C. (2d) 189; Mueller Ltd. and United Automobile Workers Local 456, (1975) 7 L.A.C. (2d) 282; Douglas Aircraft Co. of Canada and United Automobile, (1972) 2 L.A.C. (2d) 56.

DECISION: 83-54

Construction Association Management Labour Bureau Limited and United Association of Journeymen and Apprentices of the Plumbing, Steam-fitting and Pipefitting Industry of United States and Canada, Local 682.

S. Bruce Outhouse, Arbitrator

Gerald J. McConnell, for the union
Eric Durnford, for the employer
May 26, 1983

ISSUE: Promissory Estoppel 2:2200; Negotiating History 3:4420; The Object of Construction: The Intention of the Parties 4:2100.

CIRCUMSTANCES: The union and the employer disagreed on the terminology of the collective agreement. The union wants a clause to read "all journeymen working on stainless steel" and the employer wants it to stand as "all journeymen welding on stainless steel". If it is changed to "welding" it would require the payment of premiums to pipefitters as well as welders. The agreement is between the employer and a number of local unions. During negotiations the wording was changed from "welding" to "working". The union claims its intention was to broaden the number of employees getting the premium, but the employer says that throughout it was only considered a housekeeping change and the intent was not to include pipefitters. As not all the locals had yet signed the agreement, the employer deleted the premium benefit from subsequent copies and does not feel bound by the clause. The union says that because any agreement was signed it is a legal collective agreement and the employer must pay. Further evidence from the employer indicated that union representatives knew the deletion was to be done and gave tacit agreement to this. Regardless, the union should be estopped from inforcing it as they implied it was only a housekeeping change which would not necessitate changes to the monetary benefits paid by the employer. When the employer insisted in the change before signing the remaining agreements the union negotiators agreed to revert to the original phrase using "welding" instead of "working". The union's position is that the negotiators had no authority to do this.

AWARD: The first agreement which incorporated the word "working" was binding and the deletion of the clause from subsequent agreements was never authorized by the union membership. Nevertheless, the estoppel argument is successful in that the union did not clarify its position until after the agreement was signed, with the result the employer agreed to something he had not intended. He was justified in the changes to the remaining agreements, and the employer's argument is accepted. The grievance is dismissed.

DECISION: 83-55

The Governors of Dalhousie College and University AND Canadian Union of Public Employees, Local 1392

S. Bruce Outhouse, Chairman; James Henley, Gregory I. North

N. Blaise MacDonald, for the union
Eric Durnford and Sarah Filbee, for the employer
May 14, 1983

ISSUE: Limits to the Arbitration of Grievances: Arbitrability - Prior Award 2:3220; Grounds for Discipline - Theft 7:3310; The Hearing: Preliminary Matters - Specific Applications of the Burden of Proof - Discharge and Discipline 3:2410; The Hearing: Preliminary Matters - Onus or Burden of Proof 3:2400

CIRCUMSTANCES: The grievor was dismissed, along with a fellow employee, after being accused of the theft of keys to a canteen on the Employer's premises. Both employees were acquitted of criminal charges by a provincial court judge and the other employee reinstated after a hearing by another Arbitration Board, chaired by Milton Veniot.

The crucial finding of fact by the Veniot Board is the finding that the present grievor had the key to the canteen and opened the door.The Employer maintained that the present Board was bound by the finding of fact of the other Board, on the principle of issue estoppel.

The grievor was accused of having taken the key based on the evidence of a security guard who had been placed in hiding in the canteen to see who entered the canteen using the missing key. However, the police were unable to find the key on the grievor when they arrived on the scene later.

AWARD: The grievance succeeds. The Board found that the principle of issue estoppel did not apply because the grievor did not participate in the proceedings of the other Board, either personally or through counsel, being present only as a subpoenaed witness. To hold otherwise would deny the grievor his right of hearing before the Board.

The Board found the onus of proof rested with the Employer, who did not discharge it. They pointed to discrepancies in the testimony of the security guard which called into doubt the guilt of the grievor.

It was ordered that the grievor be reinstated, without compensation.

DISSENT: North accepted the evidence of the security guard, explaining any discrepancies which he viewed as minor. He found on the merits of the case that the Employer discharged the onus to establish just cause for the Grievor's discharge and would dismiss the grievance.

AUTHORITIES: Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; Brown and Beatty: Canadian Labour Arbitration, p. 86; Re: Douglas Aircraft Co. of Canada Ltd. and United Automobile Workers (1972), 2 L.A.C. (2d) 56 (Weiler); Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927 and Twin Cities Co-operative Dairy Limited (November 30, 1982), unreported (Outhouse); Re: Fuel, Bus, Limousine, Petroleum Drivers and Allied

Employees, Local 352, and Air Terminal Transport Ltd. (1970), 22 L.A.C. 143 (Brown); Re: British Columbia Telephone Company and Telecommunication Workers' Union (1978), 18 L.A.C. (2d) 225 (Weiler); Dalton Cartage Company Limited v. The Continental Insurance Company and St. Paul Fire and Marine Insurance Company (1982), 40 N.R. 135; Bater v. Bater [1950] 2 All E.R. 458.

DECISION: 83-56

Civil Service Commission **AND** The Nova Scotia Government Employees Association

Peter E. Darby, Arbitrator

Ronald A. Pink, Lance Woolaver, for the union
Reinhold M. Endres, for the employer
May 6, 1983

ISSUE: Grounds for Discipline - Carelessness 7:3520; Disciplinary Penalties - The Nature of Disciplinary Sanctions 7:4210.

CIRCUMSTANCES: The grievor sought to have removed from his personal file a letter of reprimand in the strongest terms which was to remain in his file for an indefinite period. The reprimand followed an incident in which the grievor damaged the blade of a helicopter, the cost of repairs to which were borne by the department for which he worked.

The grievor had been flown by helicopter to the site of a serious chemical spill to obtain samples of soil and water for testing. To avoid contamination, he wore a rubber suit and boots. Getting into the helicopter to return with the samples, the grievor remembered that he should remove his suit to avoid contaminating the pilot. Unable to get the attention of an assistant on the ground because of the roar of the motor and turning blades, the grievor began to throw his suit onto the ground. His boot caught the tip of one of the blades damaging it.

At issue was whether the damaging of the blade was the result of an accident, carlessness or negligence.

AWARD: The grievance succeeds, in part. The arbitrator found the grievor's action to be carelessness, which he equated with an error in judgement. He based this on the fact that the grievor had been given no training in safety around helicopters, the long hours of work by the grievor prior to the incident and the pressures of time and politics to get the contamination samples.

Displinary action in the form of a verbal reprimand was substituted for the written reprimand.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, para 7:3520, pp. 330-331; Re: Chrysler Corp. Ltd. (1955), 5 L.A.C., 1984; Re: Canadian General Electric Company Limited (Peterborough), (1951) 2 L.A.C. 959; Re: United Steel Workers, Local 3021 and Federal Wire & Cable Co. Ltd. (1967), 18 L.A.C. 283.

DECISION: 83-57

Sydney Steel Corporation AND United Steelworkers of America, Local 1064.

F. B. William Kelly, Arbitrator

Paul Grezel, for the union
Gregory I. North, for the employer
June 2, 1983

ISSUE: Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Grounds for Discipline - Non-disciplinary Demotion 7:3546.

CIRCUMSTANCES: Returning to work after an absence due to an on-the-job accident, the grievor was assigned to a lower-paying job in the same department. The Company stated that this was as a result of the grievor's high incidence of accidents and workers' compensation claims. The new job was less stressful and if the grievor was without accident for six months, he would be returned to his former job. The stated basis for the transfer was for the grievor's benefit and to protect him from further accident.

Before the grievor's return to his former position, the Union filed a grievance alleging that the Company had violated the seniority clause and the promotion of safety clause in the Collective Agreement. The former clause provided for seniority in any rearrangement of the work force which was breached when the grievor was given a lower-paying job in his department. The Union argued the latter clause was breached because the Company's attitude inhibited employees from reporting any accidents for fear of being given lower-paying jobs if they reported "too many".

The Company did not feel that the seniority clause was invoked because the transfer of one man did not constitute rearrangement of the work force. They argued that the Management Rights clause allows the Company to transfer its work force and the only restriction on that right must be found in the Collective Agreement.

AWARD: The grievance succeeds. The arbitrator found that the grievor was transferred within his Department to a lower-paying job and that this was a rearrangement of the working force as contemplated by the Collective Agreement; thus breaching seniority provisions. Although there was no malice in the Company's actions, unless it could be proven that such a transfer would decrease his accident record or improve his attendance record, it was not a proper exercise of employer's rights. Such evidence was not given. Under the wording of the Collective Agreement, the grievor's position was temporary and he was therefore entitled to his regular rate of pay. The Arbitrator also clarified that had the transfer been a disciplinary action, the decision of the Company still would not have been upheld because any lack of ability or incompetence on the part of the employee, warranting discipline, was not established.

It was ordered that the grievor be reimbursed for his salary loss during the period in question and reinstated in the event that the transfer affected his seniority.

AUTHORITIES: "Reasonableness Required in Demoting for Health Reasons" Canada Labour Views; Brown and Beatty: Canadian Labour Arbitration para 7:3546, p. 337; Palmer: Collective Agreement Arbitration in Canada 2d. p. 422 ff.

DECISION: 83-58

Dartmouth General Hospital and Community Health Centre **AND** Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606.

Judge J. A. MacLellan, Chairman; Bill McMullen, Hector McInnes

Ronald A. Pink, for the union
Gregory I. North, for the employer
June 3, 1983

ISSUE: Seniority - Acquisition and Termination - Non-unit Employment 6:1120; The Skill and Ability Requirement - The Scope of Arbitral Review 6:3100.

CIRCUMSTANCES: The grievor, a part-time employee in the housecleaning department was denied a promotion to full-time. The position was given to a supervisor from another department and was posted only after the other employee had been given the job (which was in the Bargaining Unit). The basis of the grievance was seniority, the grievor arguing that she had seniority in the Department since the other employee left the Bargaining Unit to become a supervisor. The job was provided for the employee because her work as a supervisor was not satisfactory.

AWARD: The grievance fails. It was indicated in the Collective Agreement that an employee did not lose seniority if he filled in temporarily for a supervisor. The Board extrapolated and found that the employee who got the job did not lose seniority for positions because she became a supervisor.

DECISION: 83-59

Camp Hill Hospital **AND** Public Service Alliance of Canada

S. Bruce Outhouse, Chairman; Rodney V. Bays, Donald MacDougall

Derek Dagger, for the union
Brian Johnston, for the employer
April 12, 1983

ISSUE: Compensation - Bereavement Leave - Duration 8:3530; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; The Arbitration Process - Admissibility of Evidence - Past Practice 3:4430.

CIRCUMSTANCES: The grievor maintained that he was wrongfully denied two days bereavement leave. The grievor's mother died on a Friday. When he contacted the personnel office, he was told to report for his shift on Thursday, which he did. The Collective Agreement stated that:

> Where a member of an employee's immediate family dies, he shall be granted five consecutive days leave of absence, and shall be paid for all tours of duty he would have worked had the death not occurred.

The Union argued, based on the definition of "leave of absence" in another article of the Agreement that "five consecutive days leave of absence" referred to days on which the employee was scheduled to work. Therefore the grievor was entitled to five working days leave, since the Saturday and Sunday following his mother's death were his days off.

The Employer argued that the phrase "leave of absence" should be interpreted broadly to relieve the employee from all obligations, such as the overtime, call-back and stand-by provisions of the Agreement during the time of bereavement. Thus, they interpreted the provision to mean five calendar days and had enforced this interpretation for the four years prior to the grievance.

AWARD: The grievance succeeds. The Board saw no ambiguity in the wording of the Agreement, so did not admit past practice as an aid to interpretation. "Five consecutive days leave of absence" referred to working days based on the Agreement's definition of leave of absence.

The Board also noted that the employee was entitled to be fully compensated for specific shifts he was scheduled to work during the leave of absence, including any applicable shift premiums or pay differentials, based on the wording of the clause. The leave was to commence from the day for which the bereaved employee applied and not necessarily from the date of death as the Employer assumed.

It was directed that the grievor be compensated for the tours of duty he was scheduled to work on the two days he was denied leave.

DISSENT: MacDougall found the relevant article of the Agreement ambiguous in its meaning, and pointed out the ambiguities in the context of the rest of the Agreement as well as the ambiguities that would arise if the interpretation of the majority was applied. Therefore, he turned to past practice as an aid to interpretation and would have dismissed the grievance.

AUTHORITIES: Re: Lafarge Concrete Ltd. and Teamsters Union, Local 213 (1980) 27 L.A.C. (2d) 429 (McColl); Burows: Interpretation of Documents; Brown and Beatty: Canadian Labour Arbitration, p. 421.

DECISION: 83-60

Texaco Canada Inc. AND Atlantic Oil Workers, Local 1

S. Bruce Outhouse, Chairman; Raymond F. Larkin; Gregory I. North

Brian Johnston and Eric Durnford, for the union
John Merrick, Q.C., for the employer
April 20, 1983

ISSUE: Organization of the Workplace - Assignment of Bargaining Unit Work to Non-Unit Employees 5:1400; Health and Safety 7:3621; Organization of the Workplace - Introduction (Management Rights) 5:0000

CIRCUMSTANCES: Two members of the Bargaining Unit carried out a routine safety inspection of certain of the Employer's equipment situated at the dock. As instructed, the dockman (i.e. the employee responsible for overseeing operations at the dock), also a member of the Bargaining Unit had prepared the area for the inspection and issued the requisite "Safe Work Permit" before requesting to go home because of illness. Before allowing the dockman to leave, the Superintendent of Operations personally inspected the work at the dock and decided that there was no necessity to call in the stand-by dockman, while allowing the dockman on duty to leave. After the dockman left, the security guard, not a member of the Bargaining Unit, moved from the guardhouse to the dock office, as per posted security regulations.

The Union grieved on behalf of the stand-by dockman, alleging that the Employer, by not calling in the stand-by dockman and by stationing the guard in the dock office, had breached the recognition and safety provisions of the Collective Agreement.

AWARD: The grievance fails. The Board found that the guard did no dockman's work while stationed in the dock office so the recognition clause was not violated. The inspection work being done was of a routine nature and was being performed by experienced and competent personnel. The most "dangerous" part of the work was done before the dockman went home. Therefore, the Employer was not compromising the safety of the inspection workers.

DECISION: 83-61

The Strait-Richmond Hospital AND Canadian Union of Public Employees, Local 2436

S. Bruce Outhouse, Chairman; Linda Gallant; Donald N. MacDougall, Q.C.

A. K. Cunningham, for the union
Brian G. Johnston, for the employer
June 9, 1983

ISSUE: Compensation - Paid Breaks 8:3700; The Collective Agreement - The Object of Construction: Intention of the Parties 4:2100; The Collective Agreement - The Collective Bargaining Context 4:2300; Jurisdiction of the Arbitrator - Remedial Authority of the Arbitrator 2:1400

CIRCUMSTANCES: The Union grieved that medical records clerk typists did not receive the rest and meal periods to which they were entitled under the Collective Agreement when they worked afternoon/evening shifts, weekends and holidays. The Collective Agreement stipulated that normal hours of work were eight hours including a meal period and two rest periods totalling sixty minutes. The rest periods to be of fifteen minutes duration, one in each half of the shift. Recognizing that relief was available only before 4:00 p.m. on weekdays, the Union argued that the typists be compensated for the loss of any rest and meal periods; if those periods could not reasonably be accomplished.

The Employer argued that the entitlement to such periods was not clear under the Collective Agreement. Counsel interpreted the clause to refer only to full-time employees, with those working six-hour shifts not entitled to a meal period. Authority was cited that any entitlement to a meal period need not be 30 minutes consecutive but can be broken into shorter periods totalling 30 minutes. The Employer also argued that the part-time typists were not entitled to full 15-minute periods because, according to another clause in the Agreement, their benefits were to be prorated.

During the evenings, the typists were permitted to take breaks in an adjoining room, but they remained responsible for their duties at the admission desk. The Employer pointed to authorities to argue that continuing job responsibilities was not inconsistent with the taking of rest and meal periods as contemplated by the Collective Agreement.

AWARD: The grievance succeeds. The Collective Agreement was interpreted to provide full-time employees with rest periods of 15 consecutive minutes in each half of the shift; therefore the meal period was for 30 minutes. The only discretion left to the Employer was to decide the precise times and possible location at which they were to be taken. Prorating for part-time employees, they were entitled to one break and a meal time, both consecutive time periods.

The Board found that the meal and rest periods were to be times when the employees were freed from the normal responsibility of their jobs. The authorities cited were distinguished because of the types of job involved.

Compensation in lieu of rest and meal periods taken was ordered.

AUTHORITIES: Re: United Steelworkers and Lake Ontario Steel Company Limited (1968), 19 L.A.C. 103 (Weiler); Re: Canadian Brotherhood of Railway, Transport and General Workers, Local 606 and The Halifax Infirmary (January 19, 1979), unreported (MacDougall); Re: St. Michael's Hospital and International Union of Operating Engineers (1973), 3 L.A.C. (2d) 443 (Rayner); Re: International Union of Operating Engineers, Local 968 and 968B and Abbie J. Lane Memorial Hospital (December 31, 1976), unreported (Clarke); Re: International Union of Operating Engineers, Local 968 and 968B and Abbie J. Lane Memorial Hospital (October 19, 1978), unreported (Clarke); Brown and Beatty: Canadian Labour Arbitration, pp. 50-51.

DECISION: 83-62

Hawker Siddeley Canada Inc., Trenton Works Division **AND** United Steel Workers of America, Local 4253

R. Lorne MacDougall, Q.C., Arbitrator

Robert Young, for the union
John W. Howatson, for the employer
June 13, 1983

ISSUE: Seniority - Bumping 6:2330; Seniority - Bumping Upwards 6:2340; Seniority - The Skill and Ability Requirement 6:3000.

CIRCUMSTANCES: The Union grieved on behalf of a senior employee who was not permitted to bump into the position of senior order clerk. The employee had been with the company fifteen and one-half years, working in various clerical positions, including several grouped with that of senior order clerk by the Collective Agreement as related experience.

The Union argued that senior employees should have bumping rights within a group as long as they have minimal qualifications. The Employer argued that the responsibilities of senior order clerk were substantially different than those of other jobs in the group and a bumping situation made no provision for the extensive training that would be required.

AWARD: The grievance fails. The employee did not have the "related experience" stipulated in the Collective Agreement because the source or background of the duties of senior order clerk was not the same as the clerical and stenographical jobs performed by the grievor.

DECISION: 83-63

Maritime Beverages Limited **AND** Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

R. Lorne MacDougall, Q.C., Chairman; Wallace Jewers, Donald H. McDougall, Q.C.

Ronald A. Pink, for the union
Eric Durnford and Sara Filbee, for the employer
April 19, 1983

ISSUE: Compensation - Payment of Medical Premiums 8:3310; The Collective Agreement - The Object of Construction: Intention of the Parties 4:2100.

CIRCUMSTANCES: The grievor alleged that the Employer violated the provisions of the Collective Agreement in calculating the pay equivalent sickness bonus to which he was entitled. As a result of an accident at home, he had been off work for six working days. During that time, the Employer paid one-third of his wages, with two-thirds being paid by an insurance company under the terms of an indemnity policy carried at the work place. When the sick pay bonus for the year was calculated, the grievor was deducted for all six days he was off. The Union argued that only one-third of that time, that is, the amount paid by the Employer in salary, should have been deducted.

The Union testified that this was an area of ambiguity that the Employer agreed would be settled by the decision of the arbitration. The Employer denied this and introduced evidence to show that this practice had been followed for several years. At issue was the determination of the construction to be placed on the term of the Collective Agreement "for each day that sick benefits have been paid".

AWARD: The grievance succeeds. Using the context of the Collective Agreement to determine the meaning of the word "day", the Board concluded that it meant one full day, one-third day's benefits not being equivalent to one day as stipulated in the Agreement. If the latter interpretation was intended the words "or part thereof" could have been inserted. The Employers evidence of past practice was not sufficiently uniform and open over a number of years to be reliable. Nor was it necessary because the Board found no ambiguity in the words of the Agreement.

It was ordered that the bonus in question be adjusted accordingly.

DECISION: 83-64

Maritime Telegraph and Telephone Company Limited AND International Brotherhood of Electrical Workers, Local 1030.

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Gregory I. North, for the employer
June 21, 1983

ISSUE: Seniority - Lay-Off 6:2200; Seniority - Acquisition and Termination - Non-Working Periods 6:1110; Jurisdiction of the Arbitrator - Individual Contracts of Employment 2:1210.

CIRCUMSTANCES: The grievor alleged that her seniority rights were violated when she was laid-off as a telephone operator. The Employer conceded that the grievor did have seniority, having 16 1/2 years of "net credited service" but argued that she was estopped from claiming her seniority rights by a letter she had signed when she was rehired full-time after working for several years part-time.

The letter in question stated that the Employer anticipated the need for a smaller operator work force with the introduction of more Direct Distance Dialing and the Employee was guaranteed of employment for a specified period only. The letter was also signed by the shop steward who accompanied the grievor at the time, although it did not appear to be required by the Employer.

Older authorities cited indicated that, in the content of a collective bargaining relationship, agreements made between an employer and an individual could form the basis of an estoppel. More recent authorities were to the opposite effect.

AWARD: The grievance succeeds. The Employer could not, by private arrangement, deprive individual employees of rights guaranteed under the Collective Agreement. The Union has exclusive bargaining agency, in this case with both statutory and contractual recognition. Nor did the signature of the shop steward indicate that the Union was agreeing to allow the grievor to waive her seniority rights.

The grievor was ordered reinstated to regular employment, with full compensation for lost pay and benefits resulting from her wrongful lay-off.

AUTHORITIES: Re: United Packinghouse Workers, Local 446, and T.H. Taylor Co., Ltd. (1960), 2 L.A.C. 102 (Cross); Re: United Automobile Workers and E.W. Bliss Co. (Canada) Ltd. (1968), 19 L.A.C. 376 (Krever); Re: Baker and Confectionary Workers, Local 284, and Shaw Baking Co. Ltd. (1972), 24 L.A.C. 169 (Cunningham); Re: Consolidated Bathurst Ltd. and International Association of Machinists, Local 1505 (1973), 4 L.A.C. (2d) 236 (Stanley); Re: Oshawa Times and Toronto Newspaper Guild, Local 87 (1977), 14 L.A.C. (2d) 375 (McLaren); Re: Regional District of Nanaimo and Canadian Union of Public Employees, Local 401, (1980) 25 L.A.C. (2d) 34 (Vickers); McGavin Toastmaster Ltd. v. Ainscough et. al. (1975), 54 D.L.R. (3d) 1 (S.C.C.); Re: Nova Scotia Civil Service Commission and Nova Scotia Government Employees Association (1980), 24 L.A.C. (2d) 319 (Christie); Re: Winnipeg Police Association et. al. and City of Winnipeg et. at. (1980), 110 D.L.R. (3d) 196 (Man. C.A.).

DECISION: 83-65

Dartmouth General Hospital and Community Health Centre AND Canadian Brotherhood of Railway, Transport and General Workers, Local 606.

Innis Christie, Chairman; Hector McInnes, Margaret Scott

Ronald Pink, for the union
Gregory North, for the employer
May 30, 1983

ISSUE: The Object Of Construction: The Intention Of The Parties 4:2100; Work Hours And Shifts 5:3100; Weekly Overtime 8:2120.

CIRCUMSTANCES: The grievance is that an employee should have been paid overtime for work on a scheduled day off. The grievor, regularly scheduled for 10 shifts in a two week period, was mistakenly scheduled for only nine, giving her an extra day off. When the employer discovered the error, the grievor was asked if she wanted to make up the tenth shift on the scheduled day off. She did so and then asked for overtime pay for the day worked, citing the collective agreement for justification as it specifies overtime for work on a scheduled day off. The agreement was ambiguous as to whether premium pay is necessary for voluntarily working an erroneously scheduled day off, rather than those employees who would be required to come in.

AWARD: The Board did not feel the grievor had been required to come in to work, but was given the option of fulfilling her regular number of shifts. This did not constitute working overtime even though management had wrongly scheduled that day off. Overtime would have been appropriate if she had already worked the usual 10 shifts and then been required to come in.

DISSENT: Scott dissents because she felt management had a responsibility to correctly schedule employees' shifts and when an error is made, the employee should not be penalized.

DECISION: 83-66

Seaview Manor Home for Special Care AND the Seaview Manor Home for Special Care Local of the Nova Scotia Nurses' Union.

Elwin J. MacNeil, Chairman; Leo McIntyre, Gregory North

David Reynolds, for the union
J. Reeves Matheson, for the employer
May 24, 1983

ISSUE: Preliminary Objections 3:2100; Foremen and Supervisors 5:1126; Bargaining Unit Work 5:1200.

CIRCUMSTANCES: The question is whether a newly created position of head nurse is within the bargaining unit or whether it is a management position. Initially there was a question of the Board's jurisdiction. The union argued the Labour Relations Board should deal with the matter as it concerned an employee's inclusion or exclusion from the bargaining unit. The employer argued the union brought the matter to arbitration and cannot now decide the Labour Relations Board has no jurisdiction. The Labour Relations Board agreed with the employer. The employer wants the position of head nurse to be outside the bargaining unit so the nurse can take over the duties of the Director of Nursing Services during her absence, and not have a conflict over loyalty to either the union or the employer. The union says the duties of the head nurse and regular nurses are the same and she must be included in the bargaining unit.

AWARD: The grievance succeeds as the regular duties of the head nurse do not involve management services unless she is acting as the Director of Nursing Services. This is a rare occurance and she would not otherwise perform management duties.

AUTHORITIES: The Halifax Infirmary Local of the Nova Scotia Nurses' Union and The Board of Directors of the Halifax Infirmary, June 17, 1982 (S.B. Outhouse, Chairman).

DECISION: 83-67

Hawker Siddeley Canada Limited **AND** United Steelworkers of America

Eric G. Demont, Q.C., Arbitrator

Robert Young, for the union
John Howatson, for the employer
June 28, 1983

ISSUE: Past Practice 3:4430; Distribution of Work Within the Bargaining Unit 5:2000; Policy Grievances 2:3124.

CIRCUMSTANCES: The union alleges repairs done on an overhead crane by employees who were not millwrights should have been done by millwrights on lay-off. The employer argues that past practice showed repairs to cranes had usually been done by employees other than millwrights; they have the right to change work assignments if done in good faith; and the employee who grieved would not have been the one recalled as he did not have seniority, therefore the grievance cannot stand. The union argues that the grievor is the senior person who grieved the incident so it is legitimate; that millwrights usually did repair work on cranes; and the company is supposed to make changes in the work assignments only after consultation with the union which they did not do.

AWARD: The grievance succeeds. The company did not prove its case for past practice and the union can grieve for an employee regardless of his seniority status. Management rights relating to job descriptions cannot arbitrarily be used to justify changes in work assignments and management must consult with the union as set out in the collective agreement.

DECISION: 83-68

Shelburne District Municipal School Board **AND** Canadian Union of Public Employees, Local Union 1218.

R. Lorne MacDougall, Q.C., Chairman; Rick Everett, Donald McDougall, Q.C.

Dan MacLean, for the union
Eric Durnford, for the employer
June 30, 1983

ISSUE: The Object of Construction: Intention of the Parties 4:2100; Daily Overtime 8:2110

CIRCUMSTANCES: The grievor is a school bus driver who wants compensation for overtime. The agreement states a driver shall work five, 8 hour days (40 hours) a week. What is at issue is when the 8 hour day begins and ends. The grievor says it starts when he leaves home at 7:15 a.m. with the bus on his way to his first pick-up at 7:30, and ends when he returns home at 4:50, having made his last drop-off at 4:38. The school board says it begins with his first pick-up at 7:30 and ends with his last drop-off at 4:35, which does not exceed the 8 hour day. The problem arose when the grievor was given an extra student to pick-up, which added another 35 minutes to his daily route.

AWARD: The Board interprets the regular run of 8 hours a day as beginning with the first pick-up and ending with the last drop-off. The drivers are allowed to keep the buses at home as a convenience and a privilege and the time spent driving the bus to and from work is not included in the regular run. The grievance fails.

DISSENT: Everett sees that where the bus is stored, whether at the driver's home or on school property, as the place where work begins and ends. In this case it is his home and the grievor's claim for overtime is legitimate.

DECISION: 83-69

Town of New Glasgow AND Town of New Glasgow Police Association

T.J.K. Gillis, Chairman; D.B. Eddy, Charles A. MacDougall

Bruce Evans, for the union
R.B. MacDonald Q.C., for the employer
May 19, 1983

ISSUE: Qualification for Medical and Disability Benefits 8:3320

CIRCUMSTANCES: The grievor, a police constable, asked for sick leave benefits for the dates June 23, 24, 25 and July 1, 2, 3, 4. His absence was directly related to the serious illness of his son, and its resulting effect on his own mental and physical health. He submitted a letter, dated June 25, from his doctor saying he was not fit for work. The Police Commission did not agree his absence could be considered sick leave as it was 'beyond the scope of the present contract' to make that decision.

AWARD: The Board was not inclined to question the doctor's judgement as to his patient's ability to work, and as the grievor had a medical certificate, his claim for sick leave is valid. As the agreement specifies the first working day of sick leave shall not be paid, and the medical certificate was dated June 25, the Board interprets June 26 as the first working day so he is eligible for sick leave benefits for July 1, 2, 3 and 4.

DISSENT: MacDougall dissents. He feels June 23 was the first working day as the agreement does not say the first working day after a medical certificate is submitted.

DECISION: 83-70

The Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax AND Amalgamated Transit Union, Local 508.

S. Bruce Outhouse, Chairman; Frank Binns, Eric Durnford

John C. McPherson, for the union
Terry L. Roane, for the employer
July 6, 1983

ISSUE: Refusal to Obey Instruction 7:3610; The Doctrine of the Culminating Incident 7:4310.

CIRCUMSTANCES: A bus driver received a 5 day suspension for insubordination and wants it overturned. The incident which led to the suspension began with a request from a supervisor that the grievor shut off his bus between runs, an energy saving procedure by the employer. The grievor refused to do so, saying he would not be at his stop longer than the three minute limit which required drivers to shut down. The employer gave evidence to the contrary, and justified the length of suspension by citing two previous incidents of insubordination.

AWARD: The grievance fails for two reasons. The employer's calculation of the time of the stop-over was found to be more reliable than the grievor's; and regardless of what the employee felt about an order from a supervisor, he should first comply and then question. Due to his past disciplinary record, the 5 day suspension is justified.

DECISION: 83-71

Stephens Building Supplies Limited AND Retail, Wholesale and Department Store Union, Local 596.

Charles O'Connell, Arbitrator

Tom Pickford, for the union
Dave Yurchesyn, for the employer
July 6, 1983

ISSUE: Duration and Loss of Seniority 6:1200; Employee Disability 7:3200; Inability to Discharge Employment Obligations 7:3220; Theft 7:3310.

CIRCUMSTANCES: This is a grievance against unjust dismissal. The grievor had been off work due to injuries from two accidents. The time involved was 8 months during which he had returned to work on several occassions. The company finally dismissed him, giving three reasons: his inability to do the work; theft; they were going out of business and wanted to keep only employees they could trust. The union argues that the employee had seniority and the company can only terminate people because of accidents or illness after twelve months.

AWARD: The grievor still had his seniority status. The employer had at no time indicated to the grievor that he was not doing his job properly, nor did they produce any evidence to support the theft charge. The Board found this latter in particular to be an onerous accusation. The employer had no just cause for dismissing the grievor and the grievance is allowed.

DECISION: 83-72

The Municipality of the District of Lunenburg AND Corrections Officers Association of Nova Scotia, Local 5.

Judge J. A. MacLellan, Arbitrator

Raymond S. Riddell, for the union
G. F. Philip Romney, for the employer
July 11, 1983

ISSUE: Theft 7:3310; Penalty 7:3314; Mitigating Factors 7:4400; Employment Record 7:4428; Resignation 7:7100.

CIRCUMSTANCES: The grievor, a security guard at a municipal jail, was charged with theft of a jar of coffee from the kitchen. He admitted to taking the coffee, but said the cook knew about it and that he intended to pay for it later or replace it. When told he would be dismissed, he was given the option of resigning. He did so but only after two emotional meetings with his supervisors, during which he repeatedly said he didn't want to resign but felt he had no alternative. Shortly thereafter he tried to retract the resignation. The employer stated the grievor had an excellent work record and was always considered honest.

AWARD: The grievor's resignation was given while he was emotionally distressed, which led him to agree to something he would not in a more rational state. By indicating both during and after the incident that he did not want to resign shows the decision was not freely formed, and with no confirming objective conduct to support the resignation, the Board found it was not his intention to do so. As to the dismissal, the employer did have the right to terminate the grievor for theft. The claim that he inteded to replace the coffee was supported by the cook, and a good employment record and the high regard of his employer warrants the dismissal being changed to a suspension. The grievance succeeds.

AUTHORITIES: U.E.W., Local 514 and S.C.M. (Canada) Ltd. (1964), 15 L.A.C. 332; Sun Oil Employees Association and Sun Oil Co. Ltd. (1968), 19 L.A.C. 365; U.S.W. and Outboard Marine Corp. of Canada Ltd. (1970), 21 L.A.C. 270; U.S.W. Local 7551 and Precision Valve (Canada) Ltd. (1971), 23 L.A.C. 131; University of Guelph and Canadian Union of Public Employees, Local 1334 (1973), 2 L.A.C. (2d) 351; Kemptville District Hospital and International Union of Operating Engineers, Local 796 (1975), 8 L.A.C. (2d) p. 148; Metropolitan Toronto Board of Commissioners of Police (1978), 18 L.A.C. (2d) p.22.

DECISION: 83-73

The Town of Springhill **AND** The Springhill Police Association

E. J. MacNeill, Chairman; R. J. Emery, T.N. Patterson

Bruce Evans, for the union
Bill Fairbanks, for the employer
July 11, 1983

ISSUE: Temporary, Casual and Part-Time Employees 5:1124; Senior Employee If Relatively Equal 6:3220; Termination of Operations 7:7400; Measurement of Probationary Period 7:5010.

CIRCUMSTANCES: The grievor was employed as a part-time police officer for 14 months, and then he was let go. The employer said it was because they had decided to fill two permanent, full-time positions and terminate the part-time position. The grievor had applied for one of the full-time jobs but was not the successful applicant, although he had 7 years previous experience with this employer, having resigned about 8 months before returning on a part-time basis. The union argues that he became a permanent employee after working for 12 months and could not arbitrarily be dismissed. The employer's position is that the grievor was a special constable and therefore not included in the collective agreement, and the clause which specifies when a constable becomes permanent should be interpreted as a probationary clause. There were no complaints about the grievor's work performance.

AWARD: The employer's arguments were rejected for several reasons. While the part-time position may have been obsolete, the work was not; the employer simply took those hours and assigned them to a new position. The relevant clause on becoming a permanent employee does not distinguish between full-time or part-time employees, and as it does not mention probation, that interpretation cannot be attributed. The Board agreed with the union that the grievor had become permanent after 12 months and he is to be reinstated as a full-time constable.

DECISION: 83-74

Dartmouth General Hospital and Community Health Centre AND The Nova Scotia Nurses Union.

Judge J. A. MacLellan, Chairman; Raymond Larkin; Donald McDougall, Q.C.

David Reynolds, for the union
Eric Durnford, for the employer
July 12, 1983

ISSUE: Group Grievance 2:3126; Trial, Training and Familiarization Periods 6:3230; Compensation 8:1000.

CIRCUMSTANCES: This is a grievance by eight nurses who attended a workshop to ensure they could perform a procedure necessary to their jobs, and who want compensation for their time. The union argues that; a) normally the workshop would be included in the two week orientation program, but training personnel were not available which necessitated a rescheduling of the course; and b) the nurses were required to attend as they were not allowed to do the procedure on the ward without first completing the hospital course, even though they had previous training in this procedure. The hospital claims that being able to do the procedure was a condition of employment, therefore it was the responsibility of the employee to attain the skill, and the nurses were not compelled to take the hospital course.

AWARD: It was reasonable for the nurses to infer they were required to take the course as they couldn't perform the procedure until they did. As it would normally be given during orientation, for which they were paid, they should be compensated for the additional time spent at the workshop. The grievance for two of the nurses is allowed, but the other six are dismissed as those nurses were neither present nor was sufficient evidence submitted on their behalf.

AUTHORITIES: Hotel Dieu Hospital v. C.U.P.E., Local 1097 (1982).

DECISION: 83-75

Seaboard G.M. Diesel Ltd. AND International Union of Operating Engineers

Kenneth A. MacInnis, Arbitrator

Edgar C. Doull, for the union
Doug Cullen, for the employer
August 3, 1983

ISSUE: Company Rules 4:1500; Obligation of Explanation 7:3312; Falsification of Employment Records 7:3320; Refusal to Follow Instructions 7:3610; Penalty 7:3314; Employment Record 7:4428

CIRCUMSTANCES: The grievor was discharged for disregarding company rules, and says it was an arbitrary and unjust dismissal. The employer claims the grievor misplaced company property on purpose and when asked to explain he either misrepresented his actions or else refused to say anything at all, until after several separate questionings he admitted to the offense. The employer did not accuse the grievor of stealing, and expressed a high regard for his character and work. The grievor was still unable to satisfactorily explain his behavior when questioned in the hearing.

AWARD: The employer had just cause for disciplining the grievor, especially as he consistently refused to explain his actions, and in fact had lied on several occasions. However, in view of his good work record, dismissal was not necessary and is replaced with a period of suspension.

AUTHORITIES: Stelco (1952), 3 L.A.C. 1048; City of Dartmouth and Nova Scotia Union of Public Employees (1980), 27 L.A.C. (2d) 97; Toronto East General Hospital Inc. and Service Employees International Union (1975), 9 L.A.C. (2d) 311; Ontario Produce Co. Ltd. and Warehousemen and Miscellaneous Drivers' Union, Local 419 (1976), 12 L.A.C. (2d) 235; N. S. Liquor Commission and N.S. Liquor Commission Employees Union, Local 470 (1974), 5 L.A.C. (2d) 117; U.S.W., Local 3257 and Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 (Reville).

DECISION: 83-76

Enheat Inc. AND United Steelworkers of America, Local 4883

Judge J. A. MacLellan, Arbitrator

W. A. Parsons, for the union
Peter McLellan, for the employer
August 2, 1983

ISSUE: Express Prohibitions in the Agreement 5:2200; Promotion, Demotion, and Transfer 6:2100; Rights of Recall 6:2354.

CIRCUMSTANCES: The grievors were on lay-off from the Detail Department and objected to a temporary transfer of two employees from the Assembly Department to the Detail Department, feeling they should have been recalled. The union's argument is that the transferred employees were not qualified, and the grievors were in danger of losing their seniority if not recalled soon. The employer says the transfers were allowed in the collective agreement as long as there was a time limit adhered to, as it was.

AWARD: The collective agreement permits the employer to make temporary transfers under certain circumstances, and this situation fit the specifications. The argument regarding qualifications of transfered employees was rejected as it was not covered in the agreement.

DECISION: 83-77

Shelburne District Municipal School Board AND Canadian Union of Public Employees, Local 1218.

Innis Christie, Chairman; Rick Everett, Donald McDougall

Dan MacLean, for the union
Eric Durnford, for the employer
July 4, 1983

ISSUE: Company Rules 4:1500; Collective Agreement Limitations 7:1300; Warnings, Suspension, Discharge 7:3542; Essential Ingredients 7:3612; Warnings 7:4416; Discipline and Discharge - Refusal to Obey Instructions 7:3610.

CIRCUMSTANCES: The grievor is a school bus driver who was suspended for not stopping to pick up students. The union alleges discrimination against the grievor who is president of the Local. The employer had previously given him a warning about not stopping, stating their policy that drivers must stop at all sites regardless of whether they could see students there or not. The grievor felt the policy was an alteration of the working conditions as the Employer's Regulations said drivers need not wait for tardy students. The employer countered that drivers need not wait, but they must actually stop.

AWARD: The grievor clearly had not stopped at one specified site, contrary to the employer's stated policy. As he had been warned about this, the employer had just cause for disciplining the grievor and the suspension was felt to be fair. As a union official, the grievor knew the consequences of his actions. There was no evidence that the suspension was discriminatory.

DISSENT: Everett considered the requirement to stop at all sites even when no students were present was a change in the working conditions, and was not legitimate according to the terms of the collective agreement.

AUTHORITIES: York Farms Ltd., Sardis (1981), 2 L.A.C. (3d) 112.

DECISION: 83-78

Dartmouth General Hospital And Community Health Centre **AND** The Nova Scotia Nurses' Union

Innis Christie, Chairman; Raymond Larkin; Donald H. McDougall

David Reynolds, for the union
Eric Durnford, for the employer
June 21, 1983

ISSUE: The Object of Construction - Intention of the Parties 4:2100; Trial, Training and Familization Periods 6:3230; Entitlement to Wages 8:1000.

CIRCUMSTANCES: The grievance involves nine nurses who were not paid for part of their orientation period, and the union claims this is contrary to the collective agreement. Previously nurses had always been paid for orientation. The employer's position is that it obtained signed letters from the nurses before they began work agreeing to forego pay for this time, and the letters constitute a private agreement between the individual nurses and the hospital; the collective agreement provides for such arrangements. The union argues that provision is not applicable as the arrangment can only be with a "nurse", and the employees in question were not "nurses" or employees at the time they signed the letters.

AWARD: The Board agrees with the union's interpretation that as the arrangement was made prior to employment the people involved were not "nurses" at that time. The grievance is allowed and the employer instructed to compensate the employees for their orientation period.

AUTHORITIES: Syndicated Catholoque des Employes de Magasins du Quebec, Inc. v. Compagnie Paquet Ltee. (1959), 18 D.L.R. (2d) 346.

DECISION: 83-79

Sunset Residential Centre **AND** Canadian Union of Public Employees, Local 927.

Judge J. A. MacLellan, Chairman; Chester Sanford, Donald H. McDougall, Q.C.

Al Cunningham, for the union
Terry Roane, for the employer
August 15, 1983

ISSUE: The Scope of the Arbitral Review 6:3100; Senior Employee if Relatively Equal 6:3220; Ability and Qualifications Criteria 6:3300; Aptitude 6:3330.

CIRCUMSTANCES: An unsuccessful applicant for a job within the bargaining unit claims he should have gotten the job as he had seniority and the necessary qualifications. The union argues the employer must select the employee with the most seniority if he is qualified. The employer does not disagree with this principle, but in this instance felt the most senior employee, the grievor, was not qualified for the position. Evidence was given as to his lack of aptitude for the new skills.

AWARD: The Board considered the employer to have applied reasonable standards to judging all applicants and had no improper motives in selecting the less senior employee. The grievor was less qualified for the job, and the grievance fails.

DISSENT: Sanford felt that even though the grievor was not the best qualified, he could perform most of the required skills and his seniority out-weighed other considerations, especially as the successful applicant had not been employed long enough to attain any seniority.

DECISION: 83-80

Governors of Acadia University AND International Union of Operating Engineers, Local 968B

S. Bruce Outhouse, Arbitrator

Gerald J. McConnell, for the union
Leroy M. Lenethen, for the employer
August 9, 1983

ISSUE: Work Assignment - Compliance with Wage Structures 5:2400; Work Assignment - Employees Within Unit 5:2410; Management Rights - Work Assignment 5:2000; Arbitrability - Subject Matter Limitations 2:1200.

CIRCUMSTANCES: The grievor worked in the employer's electrical shop under the classification "Utility 2". In late December, 1982 or early January, 1983, the grievor obtained his certification as a journeyman electrician after completing an apprenticeship program under the Apprenticeship and Tradesmen's Qualifications Act. He then requested that his classification be changed to "Electrician". The employer refused, and the grievor continued to perform the tasks for which he had been responsible prior to his enrolment in the apprenticeship program. On January 24, 1983, the grievor filed a grievance in which he alleged that his work in the electrical shop actually was that of an Electrician.

The union argued that the employer had wrongly classified the grievor as Utility 2. The employer submitted that Utility 2 was the proper classification. Alternatively, the employer claimed that the management rights provision of the collective agreement gave the employer absolute discretion to determine the classification of an employee.

AWARD: The collective agreement implicitly empowered an arbitrator to order the reclassification of an employee, "in appropriate circumstances". The correlation of wage levels and classifications in Schedule "B" of the agreement indicated that the parties had intended to create "an enforcible and equitable wage structure" under which employees, who had similar qualifications and who generally performed the same duties, received equal pay. This inference was supported by the temporary assignment provision of the agreement - a provision which provided that an employee who temporarily performed the work of a higher classification would be paid for this work at the corresponding rate.

The grievor, in this case, was performing the work of an Electrician within the meaning of the collective agreement. His duties and qualifications were substantially the same as those of the electrical shop workers who were classified, by the employer, as Electricians. Furthermore, the grievor's work fell within the definition of "Electrical Construction Trade" which appears in the regulations made pursuant to the Apprenticeship and Tradesmen's Qualifacations Act - a definition to which the parties referred in Schedule "B" of the collective agreement.

The grievance was allowed. The grievor was reclassified as Electrician 2 and paid the rate of pay applicable to that classification retroactive to the date of the grievance.

AUTHORITIES: Re: Sudbury Mine, Mill and Smelter Workers' Union and Falconbridge Nickel Mines Ltd. (1969), 20 L.A.C. 45; Canadian General Electric Company (Davenport Works) (1951), 3 L.A.C. 991; Re: Tantalum Mining Corp. of Canada Ltd. and United Steelworkers, Local 7499 (1973), 2 L.A.C. (2d) 229; Re: United Steelworkers, Local 2900 and John Inglis Company Ltd. (1964), 15 L.A.C. 126.

DECISION: 83-81

Governors of Dalhousie College and University **AND** Dalhousie Staff Association

Innis Christie, Chairman; Donald McDougall, Chester Sanford

G. J. McConnell, for the union
Eric Durnford and Sara Filbee, for the employer
June 20, 1983

ISSUE: Overtime - Defining Overtime 8:2100; Time Limits - Continuing Grievance 2:3138; Estoppel 2:2200, 2:2210, 2:2220

CIRCUMSTANCES: The grievor was an administrative secretary with Dalhousie University from September, 1979 to June 1982. During this period, the grievor's immediate supervisor frequently assigned tasks to the grievor, and instructed her to perform them by working overtime, if necessary. The grievor's culmulative record of overtime hours was approved periodically by her supervisor.

In December of 1979, a University administrator informed the grievor's supervisor that future overtime work could be authorized only if the employee agreed to be compensated with paid time off rather than overtime pay. The grievor was aware of this directive. Her supervisor, however, assured her that she eventually would receive overtime pay for subsequent overtime work. On June 2, 1981 the grievor was informed by the Vice-President of Administration and Finance that she would be compensated only in the form of paid time off. The grievor filed a grievance on June 8, in which she claimed overtime pay for 239 1/4 hours, worked between December, 1979 and April 1981.

The employer argued that the extra time worked by the grievor did not come within the definition of overtime in the collective agreement. This definition stated that extra time worked was not "overtime" unless it was "specifically approved in advance by the responsible supervisor". The employer submitted that the arrangement under which the grievor performed extra work did not constitute specific approval in advance. Alternatively, the employer argued that because the grievance was not filed until June 8, 1981, the grievor could not be compensated for failures to pay overtime in the months of December, 1979 to March 1981 inclusive. In relation to these months, the grievance was filed outside the manditory time limit in the collective agreement. The union claimed that the employer was estopped from relying on the time limit.

AWARD: The grievance was allowed. The phrase "specifically approved in advance" referred to approval of specific tasks. Therefore, the extra time worked by the grievor was "overtime" within the meaning of the collective agreement, even though the grievor's supervisor had not approved specific amounts of extra time. The grievor's supervisor had led her to believe that she would be paid for her overtime work. The employer, therefore, was estopped from relying on the time limit for filing grievances.

The overtime provision in the collective agreement stated that the employer must pay for overtime work unless (a) compensation in the form of time off is made before the end of the following calendar month or (b) the employee indicates a preference for accumulated time off. Neither of these conditions were met in this case. The employer, therefore, was ordered to pay the grievor for 239 1/4 hours of work.

DISSENT: McDougall felt the extra time worked by the grievor was not within the definition of "overtime" in the collective agreement. It was not sufficient for the tasks to be specifically authorized. In order for extra work to be "overtime" work, the responsible supervisor must authorize in advance the number of hours worked in excess of the regular work week.

There was strong evidence that the grievor was an "experienced ... administrator" who knew that her supervisor's superiors disapproved of compensating her in money for extra time worked and of approving her extra hours retroactively. The majority underestimated the importance of this evidence when it found that the grievor relied on the representations of her supervisor and reasonably expected to be compensated in money for her extra work.

AUTHORITIES: Automatic Screw Machine Products Ltd. (1972) 23 L.A.C. 396; Parking Authority of Toronto (1974) 5 L.A.C. (2d) 150; Brown and Beatty, Canadian Labour Arbitration (1977), para. 2:3130; Gorsky, Evidence and Procedure in Canadian Labour Arbitration, at p. 31.

DECISION: 83-82

The Governors of Dalhousie College and University AND Canadian Union of Public Employees, Local 1392

Judge J. A. MacLellan, Chairman; James Henley; Donald McDougall

Ray Hill, for the union
Eric Durnford and Sara Filbee, for the employer
July 29, 1983

ISSUE: Illness or Disability - Employer Response 7:3200, 7:3210, 7:3220; Evidence - Burden of Proof - Applications - Illness 7:3250

CIRCUMSTANCES: The grievor was discharged for excessive absenteeism. From 1979 to January, 1983 the grievor had been absent due to illness for a total of 215 1/2 days. The employer submitted that the grievor's record of discipline and her continual failure to attend work regularly constituted just cause for dismissal. The employer's evidence included a brief medical report and a series of letters in which supervisors of the grievor warned her that continued absenteeism would lead to dismissal.

AWARD: The grievance was dismissed. The discipline record of the grievor was not a significant factor in the Board's decision. However, the employer had established that the grievor had been unable to attend work regularly. The grievor, in such cases, bears the onus of proving that regular attendance will be feasible in the future. If the evidence does not indicate that future attendance is likely to be regular, then the dismissal is justified. In the present case, there was no evidence that the grievor's absenteeism would decline.

AUTHORITIES: Re: Niagara Structural Steel (St. Catherines) Ltd. and U.S.W., Local 7012 (1978), 18 L.A.C. (2d) 385; Dominion Textiles Ltd. and United Textile Workers of America, Local 152 (unreported).

DECISION: 83-83

Ven Rez Products Limited AND United Brotherhood of Carpenters & Joiners of America, Local 2284.

J. A. MacLellan, Arbitrator

Ronald Pink, for the union
Gregory North, for the employer
September 2, 1982

ISSUE: Compliance with the Grievance Procedure - Policy Grievances 2:3124; Compliance with the Grievance Procedure - Time Limits 2:3128; Applications of Seniority - Lay-off 6:2200; The Skill and Ability Requirement - The Scope of Arbitral Review 6:3100.

CIRCUMSTANCES: The grievor complained when she realized that two employees of less seniority than she continued to work after she had been laid off.

The company made a preliminary objection, alleging that the grievance was out of time and that the timeliness provisions of the Collective Agreement regarding personal grievances were not complied with. The union asserted that the grievance was a policy grievance and therfore within time.

The grievor was employed by the company as a common labourer, as were the two employees of less seniority. However, the three were employed in different departments, requiring different skills. The union argued that the lay-off should have been in accordance with the seniority provisions of the Collective Agreement since all were classified the same. The grievor was the most senior and could do all of the work outlined in the classification determinations of the agreement. The company argued that the seniority clause did not refer to job classifications but to the skill and ability required to perform the work remaining. The grievor could not perform the work of the other two employees.

AWARD: The arbitrator was satisfied that the grievance was a policy grievance and therefore within the time limit.

The grievance fails. It was clear from the provisions of the agreement that, in order for an employee to be retained on the payroll of the company, the employee had to have the skill and ability to perform the remaining work. The job classification referred to related to pay treatment only.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration, p. 75.

DECISION: 83-84

The Nova Scotia Liquor Commission **AND** The Nova Scotia Liquor Commission Employees, Local 470.

R. Lorne MacDougall, Q.C., Arbitrator

Gregory I. North, for the union
James C. Leefe, Q.C., for the employer
September 8, 1983

ISSUE: Applications of Seniority - Promotion, Demotion and Transfer 6:2100; Distribution of Work Within the Bargaining Unit - The Requirement of Bona Fides 5:2300; Interpretation of Collective Agreements - The Collective Bargaining Context 4:2300.

CIRCUMSTANCES: The grievor alleged that the employer violated the article in the collective agreement regarding selection of employees for promotion when it refused to transfer him to a new store which was being opened. An employee with less seniority was given the position he desired. Although the position the grievor desired was in the same classification, at the same rate of pay, he considered it to be a promotion because of better working hours and more opportunity to broaden his qualifications in preparation for a management position.

The employer maintained that the position represented a transfer, not a promotion. The grievor was seen as a competent, valued worker who would benefit the employer more in his present position. No male fides existed and the employer pointed to the management rights clause of the agreement which gave unfettered right in the transfer of employees.

AWARD: The grievance fails. In the collective agreement, the employer was given the right to promote, to transfer and to assign. Each term was used individually to indicate separate employer rights, with separate meanings. When used in this way, to promote in an objective sense had to mean to move up and not laterally, as in a transfer. Therefore, the desired position would not be a promotion for the grievor and the seniority clause of the agreement was not breached.

AUTHORITIES: Palmer: Collective Agreement Arbitration in Canada, p. 549 et seq.; Re: St. Paul's Hospital and Registered Nurses Assn. (1980) 28 L.A.C. (2d) 51; Re: Ascolectric Ltd. and International Union of Electrical Radio and Machine Workers, Local 553 (1980) 26 L.A.C. (2d) 390 (J.F. Weatherill).

DECISION: 83-85

Sobey's Stores Limited **AND** United Food and Commercial Workers Union, Local 1973.

F. B. William Kelly, Chairman; Eric Durnford; Dan Hood

Ronald A. Pink, for the union
R. B. MacDonald, for the employer
September 9, 1983

ISSUE: Primary Sources of Jurisdiction - The Collective Agreement 2:1200; Seniority - Acquisition and Termination - Non-unit Employment 6:1120.

CIRCUMSTANCES: Prior to the date of the scheduled hearing, the solicitors for both parties reached an agreement and requested the Board specify the terms of their resolution of the grievance by way of an Award.

The grievance was filed because of a difference in the interpretation of the terms of the seniority provisions of the Collective Agreement. The union believed that employees who accepted promotions or transfers out of the Bargaining Unit had to return to the unit within a specified period of time to avoid losing seniority. The company disagreed and felt that the failure to clarify a different interpretation was preventing some employees from accepting a transfer or promotion.

AWARD: There were no restrictions within the collective agreement against employees moving in or out of the bargaining unit, so employees could do so without losing their seniority.

DECISION: 83-86

The Board of Police Commissioners of the City of Sydney **AND** The Canadian Union of Public Employees, Local 758.

D. J. MacDonald, Chairman; Duncan MacKay; Lorne MacLeod

M. MacIntyre, for the union
M. G. Whalley, Q.C., for the employer

ISSUE: Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; Primary Sources of Jurisdiction - Damages 2:1410; Primary Sources of Jurisdiction - The Collective Agreement 2:1200; Vacation Benefits - Scheduling Vacations 8:3240.

CIRCUMSTANCES: The collective agreement stated that vacations for the policemen were to be scheduled between April 1 and November 15 each year. The vacation periods were to be selected on the basis of seniority within each platoon and could be changed, after approval was granted, only in an emergency.

In 1983, vacations were chosen as usual and posted. In mid-April, almost three months after the posting, the union executive was informed that the vacations would have to be changed since, due to cutbacks, the force could not hire the cadets they had hoped to have for the summer. In the past, the cadets had filled in for vacationing platoon members.

The employer maintained that the vacations were approved subject to the hiring of cadets. The union denied that this was a condition and the employer could point to nothing in writing to support this.

Alternatively, the employer argued that being unable to hire cadets was an emergency situation. The union countered that "emergency" as envisioned in the agreement meant situations involving a threat to life and/or property. The lack of funds to hire cadets meant that each platoon would be short one member for part of the shift through the vacation period. However, it was not unusual to be short one man per platoon on any given shift throughout the year.

AWARD: The majority of the Board decided that an "emergency" as contemplated by the parties to the agreement did not exist. It was unanimously agreed that the first vacation schedule had been approved since it was posted for a period of time that extended into the agreed vacation period and nothing was posted to indicate that it would be affected if cadets were not hired. Therefore the commissioners breached the agreement.

However, the board concluded that it had no jurisdiction empowering it to make an award. Even if it were otherwise, no damages were shown and the re-institution of the original vacation schedule was an impossibility. The board recommended that in the future the parties make an effort at a more mutual understanding of each other's situation in the hope of a more amicable relationship that could resolve such differences, which should never have gone to arbitration.

AUTHORITIES: Brown and Beatty: Canadian Labour Arbitration (1977), pp. 158, 52, 45.

DECISION: 83-87

Halifax Industries Limited **AND** International Union of Marine and Shipbuilding Workers of Canada, Local 1.

Judge J. A. MacLellan, Arbitrator

Gerald McConnell, for the union
Deborah Carver, for the employer
September 15, 1983

ISSUE: Premium Rates and Bonuses - Overtime Work 8:2130; Interpretation of Collective Agreements - The Object of Construction: Intention of the Parties 4:2100; Interpretation of Collective Agreements - Prior Agreements 4:2240; Evidence - Types of: Past Practice 3:4430.

CIRCUMSTANCES: The three grievors maintained that the Company should have paid them the double overtime rate for the hours worked during their regular shift on the day following overtime work. The relevant clause in the collective agreement provided that an employee be given an eight hour rest break following overtime work. However the grievors were requested to return to work the next day before the eight hours had elapsed. Because of ambiguity in the wording of the clause, the company maintained that the grievors' early return to work the next day was voluntary since overtime was not mandatory. Double overtime pay would be given only if the eight hour break would have cut into regular shift hours the next day, therefore necessitating the employees' return before the elapse of eight hours. The union argued that the clause provided for a double overtime rate whenever the employee had not had the eight hour break.

AWARD: The grievance is allowed. Based on evidence of past practice and negotiating history, and looking at the previous agreement, the arbitrator concluded that the parties to the agreement intended that in this factual situation the grievors should be entitled to the double overtime rate for the next day's shift. It was so ordered.

DECISION: 83:88

Bowater Mersey Paper Co. Ltd. **AND** The Canadian Paperworkers Union, Local 141

Judge J. A. MacLellan, Arbitrator

D. E. Grant, for the union
J. T. MacQuarrie, Q.C., for the employer
September 26, 1983

ISSUE: Application of Promissory Estoppel 2:2200; Burden of Proof 3:2400, 3:2415; The Requirements of Bona Fides 5:2300.

CIRCUMSTANCES: This is a union grievance involving lay-offs during a shut-down due to poor market conditions. The union wanted a full work crew kept on in the steam plant, arguing it was unsafe to do otherwise. It also claimed the collective agreement required the company to retain the men and past practice supported the use of a full crew. The company's position was that in a shut-down the steam plant could be maintained safely with fewer workers than usual, and submitted a letter from a Department of Labour official supporting their claim.

AWARD: There was not enough evidence presented in reference to previous shut-downs to support the union's arguement of past practice or of unsafe working conditions. The grievance fails.

DECISION: 83-89

City of Dartmouth **AND** Nova Scotia Union of Public Employees, Unit #1

S. Bruce Outhouse, Chairman; David Reynolds; Eric Durnford

Howard Epstein, for the union
Michael Moreash, for the employer
September 28, 1983

ISSUE: Functus Officio 1:5600; Remedial Authority 2:1400; Exhaustion of Jurisdiction 2:4000.

CIRCUMSTANCES: The Board was asked by the union to reconvene and give an "explanation of the spirit meaning" of a previous decision in which the employer was directed to classify four employees and compensate them according to rate schedules. However, there were no rates specified for the particular classification, and the union now asks the Board to make a further ruling to rectify the problem. The employer argues the Board was functus officio as it had not retained jurisdiction.

AWARD: While the Board had not retained jurisdiction, the problem of rates of pay arose because of a technical omission in the original award, and the Board is allowed to make changes to accurately reflect its original intention. The award is amended to include a list of rates of pay, but the Board did not feel it had the authority to enforce the award and left remedies to be worked out by the two parties.

DISSENT: Reynolds felt the Board had a responsibility to settle all matters refered to it for interpretation, which includes ordering the enforcement of its award.

AUTHORITIES: Consumer Gas, 6 L.A.C. (2d) 61; Brokman et al. and Board of Governors of Hamilton Civic Hospitals (1973) 30 D.L.R. (3d) 552; Newfoundland Farm Products Corp. (1982) 7 L.A.C. (2d) 186.

DECISION: 83-90

Atlantic Spring & Machine Co. Ltd. **AND** Industrial Union of Marine and Shipbuilding Workers of Canada, Local 15

Charles O'Connell, Chairman; Thomas Barron; Ernest Buist

Vernon MacDonald, for the union
David Parsons, for the employer
September 28, 1983

ISSUE: Incompetance 7:3510; Non-disciplinary Demotion 7:3546; The Reasonableness of the Penalty 7:4300.

CIRCUMSTANCES: The grievor was reassigned from his job as welder to that of labourer and grieved on the basis that it was a demotion. The company claimed he was unable to use the machinery competantly, resulting in low productivity and poor quality of work, and that the reassignment was not a demotion because there was no loss of pay or seniority. The grievor argued that the machinery did not work properly, and that he would lose his welding skills if he was indefinitely assigned labourer's work.

AWARD: The Board found the reassignment to be a demotion as the grievor was required to perform an inferior type of work. While the company had the right to demote employees for incompetance, the discipline was excessive as an indefinite reassignment would lead to a deterioration of skills. The company was instructed to reinstate the grievor as a welder as soon as he completed a course designed to imporve his skills on the machinery in question.

DECISION: 83-91

Inverness County Municipal Corporation **AND** Canadian Union of Public Employees, Local 2031.

Charles O'Connell, Arbitrator

Ronald Blunden, for the union
Harold MacIsaac, for the employer
October 13, 1983

ISSUE: Pension, Insurance and Welfare Plans 4:1400, 8:3300; Temporary, Casual and Part-Time Employees 5:1124; Alteration of Wages 8:1400.

CIRCUMSTANCES: Two part-time employees retired with unused sick leave credits. They claim their sick leave increment should have been calculated in the same manner as for full-time employees, being the number of sick days accumulated multiplied by the last hourly rate of pay. The increment they received was based on a diminishing basis at the rate they were getting the year the sick leave was accumulated. The collective agreement states the benefits paid part-time employees should be pro-rated against similar benefits received by full-time employees.

AWARD: The Board found the company had no authority to alter the method of calculating increments paid to part-time employees from that used for full-time employees. The grievance succeeds.

DECISION: 83-92

Maritime Telegraph and Telephone Co. Ltd. **AND** International Brotherhood of Electrical Workers, Local 1030.

Innis Christie, Arbitrator

Blaise MacDonald, for the union
Gregory North, for the employer
October 24, 1983

ISSUE: The Object of Construction: Intention of the Parties 4:2100; Promotion, Demotion and Transfer 6:2100; Alteration of Wages 8:1400.

CIRCUMSTANCES: The grievor transferred from her job as telephone operator to that of mail car chauffeur. She was started at a rate mid-way in the classification in accordance with the company policy of not starting an employee at a wage lower than what they received in a previous job. Her grievance is that she should have started at a higher rate due to her 8 years experience with the company, some of which could be applied in her new job, and the company erred by not giving this consideration. The company argues the collective agreement gives it discretionary rights when assigning starting rates, and the grievor was treated fairly.

AWARD: The company does have discretionary power to assign starting rates, but the Arbitrator felt the grievor's experience was relevant and should have been a contributing factor. However, he also did not see that the assigned starting rate would necessarily have been different, and referred the matter back to the company for re-assessment in terms of the grievor's experience. The grievance is allowed.

AUTHORITIES: Metropolitan Toronto Board of Police Commissioners v. Metropolitan Police Association (1981) 124 D.L.R. (3d) 684. Toronto Printing Pressman and Assistants' Union, Local 10 v. Council of Printing Industries of Canada (1983) 83 C.L.L.C. para 14,050. Canadian Keyes Fibre Co. v. United Paper Workers International Union, Local 576 (1974) N.S.R. (2d) 81. Nova Scotia Nurses' Union v. Halifax Infirmary Hospital (1982), 54 N.S.R. (2d) 289.

DECISION: 83-93

The Isaak Walton Killam Hospital for Children AND The I.W.K. Technical Employees Association

Judge J. A. MacLellan, Chairman; D. H. McDougall, Q.C.; Tom Patterson

Ronald Pink, for the union
Brian Johnston, for the employer
October 25, 1983

ISSUE: Delay 2:3210; The Nature of Disciplinary Sanctions 7:4210.

CIRCUMSTANCES: The grievor has worked for 15 years as a technician at a children's hospital. She received a disciplinary letter resulting from a complaint filed by a parent who felt the grievor's behavior towards and handling of the child was unnecessarily harsh. The hospital indicated there had been previous negative reports about her attitude towards patients and parents, but her technical work was excellent. The grievor denied her attitude was other than appropriate and objected to the manner in which the complaint was handled. There had been a delay of several months and she originally had difficulty recalling the incident, and felt this prejudiced her ability to respond properly to the charge. She also stated she had not been asked to give her version of the incident at the time the complaint was filed.

AWARD: The Board found the grievor was incorrect in her manner with the patient and as she knew the hospital's policy was to be especially careful of patients' comfort and feelings, she erred. While the grievor should have been given an opportunity to discuss the complaint with her supervisors at an earlier date, the Board was satisfied the disciplinary letter was justified.

DISSENT: Patterson objected to the majority decision on two counts: the delay affected the grievor's ability to respond fairly to the allegations; and the test results were excellent, showing she must have done her job properly.

DECISION: 83-94

The Town of Truro AND The Truro Police Association, Local 102.

J. A. MacLellan, Chairman; J. T. MacQuarrie, Q.C.; Charles A. MacDougall

October 9, 1983

ISSUE: Past Practice 3:4430; Overtime 8:2130

CIRCUMSTANCES: The four grievors are police officers who were required to be present in court on their day off, and are claiming compensation for their time. They appeared at court in the morning as requested and after an hour of waiting were told the trial was adjourned until the afternoon when they should return. They did so and claimed for two court appearances. The employer paid for only one, saying past practice was to consider this as one appearance as it only concerned one case. There was evidence given by a seperate officer that he had always claimed and been compensated for two appearances in a similar situation.

AWARD: The collective agreement states that officers are to be compensated for each attendance, with no qualification that appearances have to involve separate cases. The grievance succeeds.

DECISION: 83-95

Maritime Beverages Limited AND Retail, Wholesale and Department Store Union, Local 1015.

R. Lorne MacDougall, Q.C., Arbitrator

Terry L. Roane, for the union
Eric B. Durnford, for the employer
November 9, 1983

ISSUE: Past Practice 3:443C; Withholding Wages 8:1420.

CIRCUMSTANCES: There are three grievances, all involving Route Merchandisers with a soft drink distributor. The merchandisers pick up loads each morning and check to make sure it corresponds with the employer's list. At the end of the day they balance the returns against the morning load; shortages must be accounted for and damaged goods are noted. Drivers are deducted for shortages and after an investigation, if they are found not to be at fault, they are reimbursed.

Grievors 1 and 2 both had damaged goods which were checked through as shortages, for which they were deducted. After the investigation they were found liable for the damages and received no reimbursement. Grievor 3 also had damaged goods but they weren't listed as they were reusable. But the following day, he was deducted for shortages. The union says that in the past deductions were not normally made for damaged goods, only for general shortages, and now the employer is implementing a new policy. The employer says this was always their policy, they are just enforcing it more strictly.

AWARD: The arbitrator accepted that the custom was to deduct for shortages, even though nothing in the agreement covered this situation, and damaged goods were a kind of shortage. The drivers always had the right to a review of the deductions, and the company had the right to decide liability. Grievors 1 and 2 were at fault and their grievances fail. With respect to Grievor 3, the damaged goods were not processed as shortages and the company had no right to change its mind later about how it handled the goods. He is to be reimbursed for the deductions.

AUTHORITIES: Milk and Bread Drivers, Local 647 and Borden Co. Ltd. (1966) 16 L.A.C. 380.

DECISION: 83-96

Volvo Canada Limited AND International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 720.

R. Lorne MacDougall, Q.C., Aribitrator

Larry Sheffe, for the union
John P. Merrick, Q.C., for the employer
November 14, 1983

ISSUE: Fighting, Assault 7:3430; Insubordination 7:3600; Insolent Unco-operative Behavior, Obscene Language 7:3660; Culminating Incident 7:4310

CIRCUMSTANCES: The grievor was discharged for insubordination and accumulated offences resulting from a poor attitude. The culminating incident occurred when the grievor questioned the amount of work he was expected to do, and a heated discussion ensued with his supervisor, with the grievor using profanity. The supervisor reported the incident to his superiors and it was decided to terminate the grievor as there were previous complaints about his work habits and offensive conduct towards management. When informed of this, the grievor made threatening remarks to his employer. He later apologized for his behavior and asked to be reinstated, promising a change of attitude. In reference to the above disagreement, he believed that the conversation with his supervisor was "off the record" and he would not normally have used profanity.

AWARD: The grievance fails. Evidence as to the grievor's attitude gave justification to the dismissal and there was no reliable indication that it would change. He had been given several warnings about the consequences of his actions and it was not a deterrence to the confrontational and offensive behavior.

AUTHORITIES: Continuous Colour Coat Limited and United Steel Workers (1975) 9 L.A.C. (2d) 376.

DECISION: 83-97

Dartmouth General Hospital and Community Health Center AND The Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606.

J. A. MacLellan, Chairman; Michael Tynes; Hector McInnes, Q.C.

November 18, 1983

ISSUE: The Object of Construction: Intention of the Parties 4:2100; Weekly Overtime 8:2120.

CIRCUMSTANCES: The grievor claims she should have received overtime pay for the final two days worked in a 7 consecutive day week. The collective agreement says any employee working more than 5 days per week is to be paid overtime. The question is what is the "work week"? The union says it is the calendar week, Sunday through Saturday, in which case the grievor would have worked 7 days in one week. The hospital says that it runs a seven day week operation and the calendar week interpretation is not applicable, and for convenience "week" corresponds to their pay period, Friday through Thursday.

AWARD: The correct interpretation of "week" is that put forward by the hospital. Therefore the grievor had not worked more than 5 days in one week and is not entitled to overtime pay.

DECISION: 83-98

The Canada Post Corporation AND The Letter Carriers' Union of Canada

Innis Christie, Chairman

William Findlay, for the union
V. A. Pylypchuk, for the employer
November 10, 1983

ISSUE: Settlement of grievance 2:3230; Lateness 7:3140; Discipline and Discharge - Alcoholic Beverages 7:3560

CIRCUMSTANCES: Due to his record of lateness, the Employer gave notice of its wish to discharge the grievor, a postal worker. The Union, however, told the Employer that the grievor had an alcohol problem and persuaded it to give the Grievor one last chance. An agreement in writing was signed by the Employer, grievor and a representative of the Union, in which the grievor was to enter an alcoholic rehabilitation program and subsequent follow-up with a therapist. It was made clear in the agreement that his lateness would be closely monitored and that this was his last chance to keep his job. Four months later the Grievor was 35 minutes late as a result of oversleeping and was discharged by the Employer. The Union argued that the agreement was not binding because the representative did not have the power to bind the Union.

AWARD: The grievance fails. The Union representative who signed on behalf of the Union held himself out and the Union held him out as someone who could commit the Union. Thus, the agreement is binding. The Grievor's lateness was a breach of a significant condition of the agreement and the Employer was entitled to discharge the Grievor. It would be unjust and unreasonable for the arbitrator to reduce the grievor's discharge and give him a further "last chance".

AUTHORITIES: Canadian General Electric Co. Ltd., Peterborough Works (1954), 5 L.A.C. 1781 (Laskin); Air Canada (1980), 27 L.A.C. (2d) 405 (Weatherill); Continental Can Co. of Canada Ltd. (1975), 10 L.A.C. (2d) 35 (Weatherill); Hiram Walker and Sons Ltd. (1973), 3 L.A.C. (2d) 203 (Adams).

DECISION: 83-99

Crossley Karastan Carpet Mills Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

R. Lorne MacDougall, Q.C., Arbitrator

George Boudreau, for the union
Paul R. Richter, for the employer
November 25, 1983

ISSUE: Proprietary Rights to Overtime Assignments 5:3220.

CIRCUMSTANCES: The grievors, stationary engineers in the boiler room, grieved the employer's use of a janitor to do engineer's work rather than call the grievors in to work overtime. The employer justified its use of the janitor for two days because (a) he was available and handy and (b) the work was outside the engineer's classification.

AWARD: The grievance fails. The job in question did not fall within the grievor's classification and thus they had no right under the collective agreement to be called in.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, pp. 217-218; Palmer, Collective Agreement Arbitration in Canada (2d), pp. 638-639.

DECISION: 83-100

The Cape Breton District School Board **AND** The Nova Scotia Teachers' Union

Charles O'Connell, Arbitrator

R. J. Downie, Esq., for the union
Charles Broderick, for the employer
November 25, 1983

Grievance No. 1

ISSUE: Job posting 5:2520

CIRCUMSTANCES: The grievor, a teacher, alleged that the school board improperly filled a job vacancy. While the opening was properly posted and the grievor was given a lengthy interview, the school board in fact gave the job to another teacher who simply made an oral application for the position. The grievor argued that the school board could not unilaterally change the job application procedure to allow oral as well as written applications.

AWARD: The grievance fails. The fact that the employer had called for written applications in its job posting did not preclude it from also accepting oral applications.

Grievance No. 2

ISSUE: Seniority - Applications - Promotion 6:2100; Ability and qualifications criteria 6:3300; Examinations and tests 6:3340.

CIRCUMSTANCES: The grievor, a teacher, and another applicant were interviewed for the same job. The grievor alleged that the interview panel put too much weight on ability and not enough on length of service and professional qualifications. The interview panel believed that seniority and professional qualifications allowed the applicant to get to the interview stage, and thereafter the panel chose the individual with the best ability to do the job. The collective agreement stated that "ability, professional qualifications and length of service shall be the determining factors for purpose of promotion".

AWARD: The grievance succeeds. The interview panel violated the collective agreement when it attached disproportionate weight to the ability factor at the expense of the other criteria. All three criteria should be awarded equal weight in the selection process.

DECISION: 83-101

Canada Cement LeFarge Limited **AND** United Cement, Lime & Gypsum Workers International Union

J. A. MacLellan, Chairman; David Reynolds; Fred Beairsto

November 21, 1983

ISSUE: Bumping 6:2330; Trial, Training and Familiarization Periods 6:3230.

CIRCUMSTANCES: The grievor, a shipping clerk, bumped down into a secretarial position. The collective agreement provided for a maximum 28 day familiarization period in the new job; if the worker did not qualify for the job, he was laid off. During the grievor's familiarization period as secretary he was never told what was expected of him nor was his typing criticized. At the end of his familiarization period, th grievor was told he did not qualify for the position and was subsequently laid off. The grievor alleged that he was improperly denied the secretary position.

AWARD: The grievance succeeds. The employer has a right to set employee standards, however, during a familiarization period the grievor must be advised as to what these standards are and in what areas he is not conforming to those standards. The employee must have the opportunity to demonstrate that he can perform the job. Otherwise, it is not a "familiarization" period within the meaning of the collective agreement.

DECISION: 83-102

City of Halifax **AND** Halifax Civic Employees Local Union 143, C.U.P.E.

John P. Merrick, Arbitrator

Gerald J. McConnell, for the union
Barry S. Allen, for the employer
November 30, 1983

ISSUE: Company Rules 4:1500; Refusal to Follow Instructions 7:3610, 7:3621; Reasonable Personal Excuse 7:3626; Substitution of Penalty 7:4000; Provocation 7:4412; Safety Equipment 8:4100.

CIRCUMSTANCES #1: The two grievors, foremen in the City Works Dept., refused to wear city-issued safety footwear, alleging that the department's policy was discriminatory because, unlike other city employees, the foremen in their local were not permitted to get outside safety footwear and had to wear city issue unless they could provide a reasonable excuse. The City suspended the grievors until they wore the proper footwear.

AWARD: The grievance succeeds in part. Different treatments does not, by itself, necessarily constitute discrimination, so long as there is some rational reason for the difference. In this case, the city failed to offer a rational reason, and so the policy was discriminatory. However, even though discriminatory, the grievors should have followed the "work now-grieve later" rule and worn their safety footwear until the matter could be grieved. They were technically insubordinate but in light of the provocation by the employer, their suspension was reduced and the arbitrator declared the footwear policy discriminatory.

CIRCUMSTANCE #2: Following the refusal and suspension of the grievors, they carried placards back and forth in front of the City Works Dept. entrance, causing a blockage which prevented city vehicles from leaving. The grievors were given a further 2 days suspension.

AWARD: The grievance succeeds in part. While provoked, the grievors were at best partially responsible for the blockage. Their suspension was reduced to one day.

AUTHORITIES: Black's Law Dictionary; Brown and Beatty, Canadian Labour Arbitration, p. 378, 343, 347; Re: Douglas Aircraft Company of Canada Ltd. (1973) 2 L.A.C. (2d) 56 (Weiler); Re: Newmount Mines Limited (1982) 3 L.A.C. (3d) 396 (Brown); Mueller Limited (1974) 7 L.A.C. (2d) 282 (Hinnegan); Ford Motor Company 3 L.A.C., 779 (Shulman); Lake Ontario Steel Co. Ltd. (1968) 19 L.A.C. 103 (Weiler); National Starch & Chemical Co. (Can.) Ltd. (1976) 11 L.A.C. (2d) 288 (Rayner); Steel Co. of Canada Ltd. (1975) 8 L.A.C. (2d) 375 (Palmer); Re: Motor Wheel Corp. of Canada Ltd. (1975) 7 L.A.C. (2d) 262; Trade Union Act, s. 41.

DECISION: 83-103

Maritime Steel and Foundries Limited AND International Moulders and Allied Workers Union, Local 332

Milton J. Veniot, Arbitrator

Edward C. Witthames, for the union
Robert MacDonald, Q.C., for the employer
December 1, 1983

ISSUE: Seniority: Rights of Recall 6:2354; The Skill and Ability Requirement 6:3000; Jurisdiction of the Arbitrator: Compliance with the Grievance Procedure 2:3120.

CIRCUMSTANCES: From March or early April of 1982 to late August 1982, the grievor worked as a "slinger roto unit" operator in the employer's foundry. On May 25, 26 and 27 the grievor was on layoff. During this period, operators with less seniority than him were assigned to the roto unit. The grievor claimed that by giving this work to men with less seniority rather than recalling him the employer violated article 23 of the collective agreement. Article 23 states that "ability being equal, seniority in employment with the Company will be the governing factor in layoff, rehiring, promotions and demotions". The grievor claimed lost wages for May 25 - 27.

During the hearing, the union representative added an alternative claim for wages lost by the grievor on May 26 and 27, when a man who had less seniority than the grievor was given work loading scrap metal.

AWARD: Both claims were dismissed. The Arbitrator accepted the employer's evidence that the grievor was less efficient that the other roto unit operators. Because his ability was not equal to that of other operators, the employer was not required, by article 23 to recall the grievor rather than use roto unit operators with less seniority. The Arbitrator rejected the union submission that, under article 23, abilities between two employees should be regarded as equal if each employee can perform the work in question. Rather, he decided that the phrase "ability being equal" in article 23 implied that the employer could choose the most efficient available worker regardless of seniority.

The grievor's claim for wages that he would have received if he had been recalled to load scrap was dismissed because this claim amounted to a second grievance which had not been submitted in writing to the employer or processed through the grievance procedure. The Arbitrator had no jurisdiction to deal with matters which were not brought before him in accordance with the agreement.

AUTHORITIES: Re: Pioneer Chain Saw Corportation and United Steelworkers of America, Local 8753 (1980), 26 L.A.C. (2d) 195; Re: Electrohome Ltd. (Cambridge) and International Brotherhood of Electrical Workers, Local 2345 (1981) 30 L.A.C. (2d) 29; Re: Canadian Trail Mobile Ltd. and United Autoworkers, Local 387 (1975), 10 L.A.C. (2d) 92; Re: U.A.W., Local 984 and York Gears Ltd. (1969) 20 L.A.C. 302.

DECISION: 83-104

Rahey's Supermarket AND Retail, Wholesale and Department Store Union, Local 596

Charles O'Connell, Arbitrator

John Bernard Campbell, for the union
Frank L. Elman, Q.C., for the employer
December 6, 1983

ISSUE: The Arbitration Process: Onus or Burden of Proof 3:2400.

CIRCUMSTANCES: On August 27, 1982, the former collective agreement expired. The current agreement was not signed until June, 1983. During the interim period the employer paid extra money to his employees on condition that the payments would be deducted from any retroactive pay owed under the next collective agreement. The current agreement provides for a wage increase retroactive to February 27, 1983 and for wage increments in August 1983 and February 1984. The employer deducted from the retroactive wage payments the amounts paid in December 1982. The union alleged that the employer had agreed orally to waive this deduction in return for a wage freeze from August 1982 to February 1983. The employer alleged that there had been no change in the original arrangement.

AWARD: The grievance was dismissed. The Arbitrator decided that the union bore the onus of proving that the employer had agreed to forgive the extra payments made in December 1982. There was no evidence of a promise or agreement to this effect.

DECISION: 83-105

M. W. Graves and Company Limited AND Bakery, Confectionary and Tobacco Workers International Union, Local 446

S. Bruce Outhouse, Arbitrator

Wallace Jewers, for the union
Brian G. Johnston, for the employer
December, 1983

ISSUE: Compensation: Qualifying for Holiday Pay - Qualifying Days 8:3120, 8:3122; Jurisdiction of the Arbitrator: The Form of the Grievance 2:3122; Group Grievance 2:3126.

CIRCUMSTANCES: The union filed a grievance on behalf of 25 employees who did not receive holiday pay for Christmas, Boxing Day or New Year's Day. The employees had been laid off on December 22 and 23 of 1982 and recalled on January 4, 1983. The layoff occurred because high inventory and lack of orders required the employer to shut down temporarily the food processing plant where the 25 employees worked. The Arbitrator found that avoidance of holiday pay was not a motive for the layoff.

The union claimed holiday pay for the 25 employees. The employer argued that under the collective agreement no holiday pay was owed, and that, in any case, the union's failure to name the employees in the grievance form deprived the arbitrator of jurisdiction to award them compensation.

AWARD: The grievance was dismissed. Under article 10.7 of the agreement, an employee only is eligible for holiday pay if (a) the employee worked his last scheduled work day before and his first scheduled work day after the holiday, and (b) these scheduled work days fall within 7 "calendar days" of the holiday. The timing of the layoff prevented each of the holidays in question from coming within the 7 day limitation. The union raised two arguments against a literal application of article 10.7. First, the union submitted that holidays should not be counted as "calendar days". This submission was rejected as contrary to the plain meaning of the phrase "calendar days". Second, the union argued that the 7 day limitation did not apply to employees on short term layoff. The Arbitrator agreed that a provision which merely required an employee to work on the last scheduled day before and the first scheduled day after the holiday would not apply to employees on layoff. Such a provision is not aimed at laid off workers. Rather, it is intended to discourage employees from being absent from work just before and just after the holiday. The Arbitrator, however, decided that the 7 day limitation was included to specify when sick or laid off employees would be entitled to holiday pay. He concluded that "in the absence of bad faith on the employer's part" article 10.7 should be applied to the 25 employees.

The employer's preliminary objection was dismissed because the failure to name the 25 employees in the grievance form did not prejudice the employer's case.

AUTHORITIES: Re: Belleville General Hospital and Service Employees International Union, Local 183 and 633 (1981), 30 L.A.C. (2d) 323; Re: T.C.F. of Canada Ltd. and Textile Workers' Union of America, Local 1332 (1972), 1 L.A.C. (2d) 382; Re: Bonavista Cold Storage Co. Ltd. and Fishermen, Food and Allied Workers, Local 349 (1975) 9 L.A.C. (2d) 362

DECISION: 83-106

Hawker Siddeley Canada Inc., Trenton Works AND United Steel Workers of America, Local 4253

R. Lorne MacDougall, Q.C., Arbitrator

Ed LeVert, for the union
John M. Howatson, for the employer
December 14, 1983

ISSUE: Bumping 6:2330; The Skill and Ability Requirement 6:3000, 6:3300.

CIRCUMSTANCES: This grievance concerns bumping. The grievor asked to bump a junior employee in the data entry department, and management agreed to allow her a two day familiarization period to see if she could do the job. She had experience as a key puncher but this job involved using different equipment. Her performance was evaluated and as she only attained one-half the speed required, was not allowed to bump the incumbent. The grievor's position is that she had the "related experience" as specified in the collective agreement; the employer had stressed accuracy rather than speed; and if it had been a job posting rather than bumping, her previous work experience would have qualified her for the position. The employer did not feel they could afford to spend up to a month training her as the data entry would fall behind and have to be compensated for.

AWARD: The grievor's previous position as a key puncher qualified as "related experience", regardless of her ability to do the job as well as the incumbent. She had demonstrated her ability to perform the duties and would, within a reasonable time, be able to attain an acceptable rate of speed. The grievor is allowed to bump the incumbent.

DECISION: 83-107

Canada Post Corporation AND Canadian Union of Postal Workers

Innis Christie, Arbitrator

Ted Penney, for the union
Heidi Levenson Polowin, for the employer
November 17, 1983

ISSUE: Management Rights 5:3210; Allocation of Overtime Within the Group 5:3224.

CIRCUMSTANCES: Overtime was required on a day shift. It is managements right to determine how many hours needed and how these hours are to be structured or distributed, in this case, an 8 hour period by one person. There is a set procedure for offering overtime to the employees and the problem arose as follows. Because management want the hours worked continuously, it was first offered to workers completing the night shift, all of whom refused, and then offered to employees on the Rest Days off list, one of whom accepted. Several workers on the day shift who could have worked part of the overtime prior to their regular shift were not given the opportunity to do so. The employer says it was their practice not to call in workers prior to their shift, and as the work was to be done by one person working 8 hours, it was not possible for anyone on the day shift to fill this requirement. The union says that after those completing a shift have been offered the overtime, workers on the upcoming shift are next in line regardless of their ability to complete the full amount of overtime.

AWARD: An employee who is completing his shift and agrees to work overtime has no problem accomodating the structure of the overtime requested by management, whether it is 2 hours or 8 hours. An employee working prior to his shift is restricted by the number of hours between the start of his overtime and the start of his regular shift. Management has the right to structure overtime as best suits the demands of the work, and nothing in the collective agreement contradicts this. The grievance fails.

DECISION: 83-108

Glenview Health Care Services Ltd. AND The Canadian Brotherhood of Railway, Transport and General Workers, Local 619.

James C. Leefe, Arbitrator

December 20, 1983

ISSUE: Reinstatement and Substitution of Penalty, 2:1470; Theft 7:3310; The Reasonableness of the Penalty 7:4300; Warnings 7:4416.

CIRCUMSTANCES: The grievor is seeking reinstatement on the grounds she was unjustly dismissed. She works as a registered nursing assistant in a nursing home and was dismissed for taking food from the kitchen. The employer has a policy that employees bring their own food and are not to rely on the nursing home for meals. The grievor was told this when she was first hired. A number of employees, including the grievor, continued to help themselves to food, but she claims this was not done regularly nor were large amounts involved. Her explanation was that she did not appreciate the employer's seriousness in trying to stop this kind of behavior.

AWARD: The practice of taking food was widespread among the employees, and apart from the nurses, it was not clear that the employees were made aware of the severe consequences of continuing the practice. The grievor at no time removed food from the premises nor made any attempt to conceal her actions. The arbitrator found the penalty too severe and replaced it with a warning. She was to be reinstated and compensated for loss of earnings.

DECISION: 83-109

Hillcrest Manor Nursing Home Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 608-A.

James C. Leefe, Arbitrator

George Boudreau, for the union
D. W. Gruchy, Q.C., for the employer
December 21, 1983

ISSUE: Time limits 2:3128; Delay 2:3210; Preliminary objections 3:2100.

CIRCUMSTANCES: This grievance deals only with a preliminary objection by the employer which concerns the time limits of grieving a dismissal. There was a 2 month delay between the time of dismissal and the filing of the grievance, and the employer felt this prejudiced their case. The grievors were aware, at the time of their dismissal, that time limits might be relevant.

AWARD: The delay was unreasonable as the grievors had been informed at the time of dismissal of their right to grieve, and initially chose not to act. The employer had no indication that a later grievance would be filed. The preliminary objection is accepted and the grievances are not allowed.

AUTHORITIES: Canadian Airline Employees' Association and Eastern Provincial Airways (1963) Limited 39 N.S.R. (2d) 28; Galloway Lumber Co. Ltd. and B.C. Labour Relations Board (1965) 48 D.L.R. (2d) 587; Oil, Chemical & Atomic Workers, Local 9-672 and Dow Chemical of Canada Ltd. (1966), 18 L.A.C. 50; Canadian Westinghouse Co. Ltd. 5 L.A.C. 2126 (Laskin); Oil, Chemical & Atomic Workers and Dow Chemical 18 L.A.C. 50 (H.W. Arthurs); Eastern Provincial Airlines (1963) Limited and Canadian Airline Employees' Association 26 L.A.C. (2d) 150.

DECISION: 83-110

Zutphen Brothers' Construction Ltd. AND United Brotherhood of Carpenters and Joiners of America, Local 1588.

Judge Robert F. Ferguson, Arbitrator

T.J.K. Gillis, Q.C., for the union
Frank L. Elman, Q.C., for the employer
December 15, 1983

ISSUE: Interpretation of the Collective Agreement 4:2000, 4:2100.

CIRCUMSTANCES: The issue is whether or not a project completed by the company was "industrial" or "commercial", which affects the workers' pay. The project involved work on an existing marshalling yard, and the union says it is part of the entire work complex which is an unloading dock. According to the collective agreement, this would make the job industrial and mean the workers should receive a higher rate of pay. The company says the complex is not an unloading dock as only loading occurs, and the agreement places a further restriction on the interpretation of industrial by requiring the project to involve tenders of over $8,000,000. This project was completed for $1,200,000.

AWARD: While the complex can be viewed as a dock it is not an unloading dock, a restrictive term not applicable in this case. The agreement specified "tenders of over $8,000,000" and there was no evidence of any such tender. The grievance fails.

AUTHORITIES: Massey-Harris (1957) 4 L.A.C. 1580; Canadian Industries Ltd. (Windsor Works) (1951) 3 L.A.C. 853.

DECISION: 83-111

Colchester Hospital AND Nova Scotia Nurses' Union, Colchester Local

S. Bruce Outhouse, Chairman; Raymond Larkin, Donald McDougall, Q.C.

David Reynolds, for the union
Eric Durnford, for the employer
December 19, 1983

ISSUE: Policy grievance 2:3124; Negotiating history 3:4420; Express prohibitions in the agreement 5:2200; Work hour and shifts 5:3100; Overtime 8:2100.

CIRCUMSTANCES: This is a union grievance against the hospital which effected a change from 8 hour shifts to 12 hour shifts for nurses in the Obstetrics Unit. The union alleges the employer should not have instituted a change without agreement from the union, but having done so it is required to pay the nurses overtime. The employer had reached an agreement with three other units in the hospital to change to 12 hour shifts, and two memoranda were added to the collective agreement to reflect this. They claim the second memorandum constituted a generic agreement which could be applied to all nurses in all units. The union said that nurses can only be put on 12 hour shifts if there is mutual agreement between all parties. Both the first and second units had separate agreements with the hospital approving the change, although with a third unit, no additional memorandum was signed. The problem with the Obstetrics Unit was that some of the nurses did not want the 12 hour shifts and no consensus was reached within the unit. The hospital decided to act unilaterally after being advised that 5 of the full-time nurses wanted to transfer to units which had 12 hour shifts. The employer felt that as there had not been an additional memorandum when the third unit had switched, it was not required for subsequent changes. The union's argument is finally that in previous units the nurses were in favour of the change, but with subsequent units the employer had no right to implement 12 hour shifts without mutual agreement among all parties.

AWARD: The union's position is correct. The memorandum applys to nurses whose standard of work hours are varied to 12 hour shifts in accordance with the terms of the collective agreement; i.e. mutual consent of the parties. No consent was given by the union, therefore the grievance succeeds. The Board disregarded evidence of negotiating history submitted by the union and to which the employer made a timely objection. The terms of the agreement were not ambiguous so the negotiating history was not relevant. As to the claim for overtime compensation, the Board's view was that there were different considerations of equity in relation to individual employees and a general order for compensation to all employees is not appropriate. The parties are directed to resolve the question of damages themselves.

Larkin included an addendum with the majority award which related to compensation. His view was that the hospital was informed before instituting the 12 hour shifts on the Obstetric Unit that the union objected and planned to grieve and ask for compensation. The union should be given an adequate remedy of full retrospective payment of overtime as an indication of the seriousness of the employer's breech of the collective agreement.

DISSENT: McDougall had a partial dissent in that he did not agree the employer breeched the agreement as the memorandum was generic and so could be applied to all units. He felt some of the evidence submitted in regard to negotiating history should have been classed as extrinsic evidence and excluded. The agreement was silent on how a unit would be selected to go on 12 hour shifts so management rights become operative as to the procedure. In regard to compensation, no individual grievances were filed nor did any nurses give evidence so no proof was given as to damages to individual nurses. Compensation is not appropriate in this case.

AUTHORITIES: Nova Scotia Nurses' Union, Halifax Local v. Halifax Infirmary Hospital (1982), 54 N.S.R. (2d) 289; Hawker Siddeley Canada Inc. v. U.S.W., Local 1231, unreported (1982 - S.H. No. 41305).

DECISION: 83-112

Dartmouth District School Board AND Nova Scotia Union of Public Employees, Unit #2.

Brian Flemming, Chairman; Eric Durnford, David Reynolds (resigned)

October 7, 1983

ISSUE: Warnings, Suspensions, Discharge 7:3542; The Resonableness of the Penalty 7:4300; Employment Record 7:4428.

CIRCUMSTANCES: The grievor, a caretaker at a school, was dismissed for improper behavior towards a female student. He claims the penalty is unjust and wants to be reinstated with any reference to the incident deleted from his personal file. The grievor was seen hugging and kissing a 12 year old female student and the employer considered this behavior to be a breach of a public trust. The grievor's position is that the hugging and kissing were a spontaneous response by the student after receiving a birthday gift from the grievor. He has an unblemished work record over 14 years of service, and a psychiatrist testified to his stability and said there was no indication the behavior would be repeated or become uncontrolled.

AWARD: It is clear that no one involved, including the school officials, saw this as a sexual assault, and that it was a single, isolated instance rather than a culminating incident. The grievor made a serious error in judgement but because of his excellent work record, the Board found the penalty too harsh. It is changed to a suspension without pay, and a severe reprimand placed on his record. He should be offered a position in another school, a demotion, and his conduct reviewed in one year when he could be reinstated as caretaker.

AUTHORITIES: National Harbours Board v. Public Service Alliance of Canada (1974), 7 L.A.C. (2d) 1; University Hospital of London and London & District Building Service Workers' Union, Local 220 (1973), 4 L.A.C. (2d) 16; St. Anne - Nackawic Pulp and Paper Co. Ltd. and United Paperworkers International Union, Local 219 (1974), 5 L.A.C. (2d) 397; North York General Hospital and Canadian Union of General Employees (1983), 5 L.A.C. (2d) 45; Stillwell v. Audio Pictures Ltd. (1955) O.W.N. 793; Corporation of the City of Calgary and Amalgamated Transit Union, Local 583 (1981) 4 L.A.R. (3d) 50; Government of the Province of Alberta and Alberta Union of Provincial Employees (1983) 8 L.A.C. (3d) 1; Young, At the Point of Discharge (1978) p. 143.

DECISION: 83-113

Cape Breton Development Corporation **AND** Canadian Union of Public Employees, Local 2046.

Frank Elman, Q.C., Chairman; T.J.K. Gillis, Q.C.; Arthur Pickup

James Crosby, for the union
Keith Crocker, for the employer
December 14, 1983

ISSUE: The Statutory Requirement 2:1100; Strikes and Lockouts 9:2100.

CIRCUMSTANCES: This is a union grievance alleging its members were locked out and asking for compensation for the time lost. The employer first argued that the matter was not arbitrable as it should be heard before the Canada Labour Relations Board. The Arbitration Board disagreed because this matter did not require immediate relief but rather a remedy for a wrongful act. Now, the union must prove there was a lockout, and that it was directed against them, not a third party. Management closed the mine because of illegal walkouts by another union and which they interpreted as a strike, resulting in the C.U.P.E. members also being out of work even though they were an innocent party.

AWARD: The illegal walkout was indeed a strike and the resulting closure of the mine was not directed towards C.U.P.E., rather the other union. The closure was a legitimate defence by management against the illegal strike and C.U.P.E. was a victim of the dispute. The grievance fails.

AUTHORITIES: British Columbia Railway Co. v. Council of Trade Union, CLLR - 16, 211; Weyerhaeuser Canada Ltd. and Pulp, Paper and Woodworkers of Canada, Local 10 (21/76).

DECISION: 83-114

Cape Breton District School **AND** Canadian Union of Public Employees, Local 232

Judge Robert F. Ferguson, Arbitrator

John Khattar, for the union
Robert Street, for the employer
December 17, 1983

ISSUE: Non-unit Employment 6:1120; Promotions, Demotions and Transfer 6:2100.

CIRCUMSTANCES: The grievor is claiming her transfer to another unit was improper as a non-union employee was retained in her area. The first question is whether C, the non-union employees, had been a union member before transferring out of the unit in 1971. The grievor had been a member of the bargaining unit since 1978 so felt she had seniority rights over C when transfer was contempleted. The union said the collective agreement restricts C's rights to accumulate seniority while not a union member and that she has to go through the standard 3 months probationary period for new employees and be placed at the bottom of the seniority list. The second complaint is that the employer failed to follow proscribed procedures which deal with Promotions and Staff Transfers as they relate to vacant and new positons, which the union contends includes C's new position. The employer says C's job was not the result of a vacancy or a new position being created, so they saw no reason to adhere to the procedures specified in the agreement.

AWARD: C does have the right to re-enter the bargaining unit with her seniority dating back to her original date of hiring by the employer; therefore the union's arguments on this point are refused. However, the employer was required to follow the proscribed procedures in filling the position assigned to C, and the grievance succeeds.

AUTHORITIES: International Association of Machinists, Local 1674 and Lucas-Rolax Ltd. (1969), L.A.C. 84; United Electrical Workers, Local 523 and Page-Hersey Tubes Ltd. (1960), 11 L.A.C. 18; United Automobile Workers, Local 127 and Motor Wheel Industries (Chatam) Ltd. (1970), 22 L.A.C. 108; United Brewery Workers, Local 800 and Loblaw Groceterias Co. Ltd. (1967) 18 L.A.C. 231; Brown & Beatty, Canadian Labour Arbitration (1977) 6:1120.

DECISION: 83-115

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Reinhold Endres, for the employer
July 27, 1983

ISSUE: Past practice 3:4430; The object of construction: Intention of the parties 4:2100; Work hours and shifts 5:3100; Daily overtime 8:2110.

CIRCUMSTANCES: The grievor is employed as a counsellor at a youth training centre where he is required to work shifts. On the day in question he worked his regular shift from 7 a.m. to 3 p.m., and later agreed to work a shift beginning at 11 p.m. the same day in lieu of his regular shift at 7 a.m. the next morning. He now claims overtime pay as both shifts occurred in the same day. The union's position is that work performed during other than regularly scheduled shifts constitutes overtime if it falls in one 24 hour period. The employer says the grievor agreed to change his shift and that work day for their purposes, based on pay schedules, begins at 11 p.m., so the grievor worked on two different days. They gave evidence indicating this had always been their position in the past.

AWARD: The grievor is not entitled to overtime in these circumstances. He volunteered to change his shift, not work extra time, and knew the employer considered it a regular shift. No provision had been made in the collective agreement about overtime pay when there were two shifts in one 24 hour period, and this implies it was not meant to be considered overtime work. The argument of past practice supports the employer's position. The grievance fails.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration (1977) p. 417-418; United Steelworkers of America, Local 4444 and Stanley Steel Co. Ltd. (Hamilton Plant) (1967) 19 L.A.C. 37 (Christie); United Steelworkers of America, Local 2699 and Emco Ltd. (1964), 15 L.A.C. 116 (Lang); Robson-Lang Leathers Ltd. and Canadian Food and Allied Workers, Local 250L (1973) 2 L.A.C. (2d) 400 (Hinnegan).

DECISION: 83-116

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Reinhold Evans, for the employer
October 13, 1983

ISSUE: Warnings, Suspension, Discharge 7:3542; Management Rights 4:2300; The reasonableness of the Penalty 7:4300; Qualifying for Medical and Disability Benefits 8:3320.

CIRCUMSTANCES: The grievor was absent from work for two days because of illness and wants to be paid for sick leave. She provided a medical certificate attesting to her illness but the employer refused to pay her because she did not produce the certificate on her first day back at work. The union claims this is an unreasonable condition. The employer says there had been a previous problem with the grievor being off sick so she had been given a standing directive to provide a medical certificate on her first day back at work if she expected to receive sick pay. It is their right to issue a directive in these circumstances, and the grievor was aware of the consequences of ignoring the directive.

AWARD: The grievance fails. Management rights must be exercised in a reasonable manner and the union has not proven the standing directive was an unreasonable response to the grievor's past history of absence from work. The grievor could have complied and been granted sick leave but she failed to do so.

AUTHORITIES: Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al. (1981), 124 D.L.R. (3d) 684 (Ont. C.A.); Sunar Division of Hauserman Ltd. and United Steelworkers, Local 3292 (1979) 23 L.A.C. (2d) 1 (O'Shea).

PART 2

SUBJECT INDEX, 1978 - 1983

SUBJECT INDEX

Abandonment ... 78-17, 78-25, 79-21, 79-22, 79-31, 79-50, 79-54, 83-17
Absenteeism SEE Discipline and discharge; Illness and disability
Adjournment ... 80-22, 82-39
  -Change of grounds ... 79-18, 82-64
    Discipline ... 79-18, 79-32
Apprenticeship and Tradesmen's Qualifications Act ... 83-08
Arbitrability
  -Agreement as primary source of jurisdiction ... 78-03, 79-22, 80-153, 82-06, 82-92, 83-85, 83-86
  -The collective agreement ... 79-12, 79-22
  -Matters arising outside of agreement ... 79-58, 80-32, 81-80, 82-57
  -Prior awards SEE Resjudicata
  -Procedural limitations
    Form of grievance ... 78-32, 83-14, 83-19
    Policy and individual grievances ... 83-14
    Raising new grounds ... 79-18
      Discipline cases ... 79-18, 82-33
    Waiver of procedural irregularities ... 82-29, 83-07, 83-19, 83-32
  -Settlement of grievance ... 83-17
  -Statutory requirement ... 79-16, 79-22, 79-24, 79-28, 79-29, 80-147
  -Subject matter limitations ... 80-128, 83-80
    Probationary employees ... 79-24, 80-147
  -Submission to arbitration ... 79-12, 79-22, 82-48, 82-51, 82-79, 83-14
Assignment of work SEE Work assignment
Award of Board of Arbitration SEE ALSO Remedies
Award of Board of Arbitration
  -Binding effect ... 82-85
    Persons not bound ... 82-109
Bargaining unit
  -All employees unit ... 79-13, 82-56
  -Bargaining unit work SEE Work assignment
  -Employees excluded ... 78-01, 79-13
    Supervisors and foremen ... 81-26
    Temporary, casual or part-time ... 79-13, 82-36, 82-69
  -Work assignment SEE Work assignment
Benefits SEE ALSO Bereavement leave; Call-in pay; Cost of living allowance; Illness or disability; Insurance and welfare plans; Overtime; Pension plans; Pregnancy; Severance pay; Statutory holidays; Travel Allowance; Vacation
  -Alteration of gratuitous benefits ... 81-89
Bereavement leave SEE ALSO Leave of absence
  -Duration ... 83-59
  -Entitlement while absent ... 80-41
  -Interpretation of day ... 80-41
Board of Arbitration
  -Award SEE Award of Board of Arbitrtion
  -Establishment ... 79-32, 79-55
  -Impartiality ... 78-15, 79-32, 79-55, 81-24, 81-81, 81-82, 81-111
  -Jurisdiction SEE Arbitrability
  -Nominees ... 79-32

Bonuses ... 82-50
Burden of proof SEE Evidence
Business records SEE Evidence
Call-in pay ... 78-43, 81-02, 81-05, 81-11, 81-55, 82-49
Certification orders ... 80-50, 80-51
Check-off SEE Union
Civil Service Joint Council Act ... 80-02, 80-146, 80-153
Classification SEE Job classifications and descriptions
Collective agreement
  -Binding effect
    Determination of ... 82-39
    Party ceased to exist ... 80-60, 80-119
  -Construction SEE Interpretation
  -Essentials ... 82-66
  -Form and content ... 78-04. 78-25, 79-07, 79-09, 79-31, 79-57, 80-158, 82-66
    Ancilliary documents ... 79-42, 80-30, 80-70, 80-164, 80-176, 82-46, 83-02
      Amendments ... 78-25, 83-45
      Company rules ... 79-04, 79-07, 82-17
      Pension, insurance and welfare plans ... 78-04, 78-25, 79-09, 83-13
      Supplementary agreements ... 79-42
  -Individual contracts of employment SEE Arbitrability
  -Limitations ... 83-77
  -Matters arising outside of ... 78-29, 79-08, 79-12, 79-53, 79-58, 80-24, 80-70, 80-164, 81-123, 82-08, 82-55
  -Sources of jurisdiction SEE Arbitrability
  -Term of operation ... 78-25, 80-73, 82-70, 82-112, 82-115, 83-50
    Retroactivity ... 79-08, 79-12, 80-13, 80-122, 82-12, 82-70, 83-45
Company rules ... 79-04, 79-07, 80-05, 80-130, 80-138, 80-169, 81-98, 82-21, 82-25, 82-44, 82-52, 83-75, 83-77, 83-102
  -Collective agreement ... 79-04, 79-07, 80-130, 80-133, 82-17, 82-102
  -Illness or disability ... 79-02, 79-33, 80-05
  -Medical examination ... 79-04, 82-25, 82-52
  -Off-duty behaviour ... 78-24, 80-118
  -Penalty ... 79-60, 80-131, 80-138
  -Personal appearance ... 78-21
  -Safety equipment ... 83-102
Compliance order SEE Remedies
Conflict of interest ... 80-142, 82-46
Consultation
  -Required by collective agreement ... 82-18
Contracting out ... 81-31, 81-45, 82-58, 82-65, 82-108, 83-50
Contracts of employment
  -Collective bargaining pre-empts ... 78-26, 78-29, 79-08, 79-12, 79-53, 79-58, 80-24, 80-164, 82-69, 82-70, 83-24, 83-64
Cost of living allowance ... 80-70, 80-139, 80-156, 81-87
Courts
  -Contracts of employment SEE Contracts of employment
  -Judicial review SEE Judicial review
Culminating incident SEE Disciplinary penalties - Culminating incident
Damages SEE Remedies
Declaration SEE Remedies
Discharge SEE Discipline and discharge; Termination

Disciplinary penalties
  -Arbitral review
    Scope ... 80-36, 82-40, 83-09, 83-40, 83-52
    Substitution of penalty ... 78-28, 78-38, 78-39, 78-41, 81-08, 83-23, 83-102, 83-108
  -Culminating incident ... 78-23, 80-07, 80-28, 80-84, 80-89, 80-99, 81-22, 81-67, 81-111, 82-19, 82-33, 82-91, 83-10, 83-35, 83-70, 83-96, 83-112
    Theft ... 78-05, 78-37, 80-131, 81-62, 83-09, 83-72, 83-108
  -Mitigating factors ... 78-28, 78-39, 79-46, 80-161, 82-33, 82-37, 82-46, 82-91, 82-104, 82-107, 83-19, 83-23
    Compassion ... 78-20
    Condonation
      Isolant behaviour ... 78-33, 78-37, 78-38, 80-03, 80-20, 81-22, 81-67, 81-111
    Discrimination ... 78-21, 80-141, 82-19, 82-40, 82-100
    Economic hardship ... 78-20
    Employees state of mind ... 78-20
      Fighting ... 80-16, 80-68
      Theft ... 78-05, 78-37, 80-131, 83-23, 83-72
    Employment record ... 78-20, 80-20, 81-79, 82-109, 83-52, 83-72, 83-75, 83-112
      Falsifying records ... 80-05, 80-91
      Insolent behaviour ... 83-96
    Failure to warn
      Lateness ... 78-07, 78-42, 79-24, 80-178
      Work performance ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44
    Provocation ... 78-28, 78-38, 80-20, 83-102
      Assault ... 80-16, 80-68, 82-40
      Refusal to obey order ... 78-11, 79-33
      Unlawful strike ... 79-47, 80-73, 80-87, 80-93, 80-141
    Reasonable personal excuse SEE ALSO Discipline and discharge
      Absence ... 80-117, 80-161, 80-172, 80-178, 82-63, 83-06, 83-09, 83-53
      Lateness ... 81-85
      Refusal to work overtime ... 80-64
    Rehabilitative potential ... 80-02, 80-43, 80-107
      Theft ... 78-05, 78-37, 80-131, 83-05
    Work performance
      Isolated instance ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44
  -Progressive discipline ... 80-107, 81-09
  -Types of penalties
    Demotion or transfer ... 79-20, 83-01, 83-90
    Loss of seniority
      Abuse of leave of absence ... 78-42, 80-38, 80-109, 80-115
    Monetary penalties
      Fines ... 81-96
      Work performance ... 78-07, 78-20, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44
    Multiple penalties ... 81-08
    Nature of penalties ... 78-28, 79-43, 80-02, 81-08, 81-58, 81-120, 82-19, 82-33, 82-46, 82-75, 82-78, 83-56, 83-75, 83-90, 83-96, 83-108, 83-112, 83-116

Disciplinary penalties
-Types of penalties
Set by collective agreement ... 80-31, 80-172, 81-10
Warning ... 79-43, 80-02, 83-116
-Union officials ... 79-47, 80-170, 82-100
Discipline and discharge
-Company rules SEE Company rules
-Culminating incident SEE Disciplinary penalties
-Evidence SEE ALSO Evidence
Burden of proof ... 79-11, 79-19, 79-36, 80-165, 80-166, 81-30, 81-43, 81-124, 83-30, 83-55
Standard of proof ... 78-05, 80-12, 80-16, 80-55, 80-131, 80-165, 80-166, 82-106
-Grounds for
Absence from work ... 79-02, 79-60, 80-15, 80-53, 80-117, 80-120, 80-138, 80-161, 80-172, 81-10, 81-114, 82-05, 82-17, 82-63, 82-96, 83-09
Failure to notify employer ... 79-60, 80-05, 80-07, 80-31, 80-138, 80-161, 82-17, 83-32, 83-53
Incarceration ... 78-24
Reasonable excuse ... 80-117, 80-161, 80-172, 80-178, 83-06, 83-09, 83-32
Abuse of leave of absence ... 78-42, 80-38, 80-109, 80-115
Alcoholic beverages or drugs ... 78-36, 79-07, 79-11, 79-27, 80-02, 80-43, 80-78, 80-92, 80-107, 81-43, 82-17, 82-96, 83-06, 83-35, 83-98
Criminal convictions ... 78-24
Damage to employers property ... 80-112
Dishonesty ... 78-37, 80-118, 82-99, 82-104
Failure to get along with workmates ... 79-18, 81-20, 83-22
Falsification of records ... 80-05, 80-91, 83-75
Fighting or threatening ... 80-16, 80-68, 82-40, 82-107, 83-19, 83-40, 83-96
Illness or disability SEE Illness or disability
Insolent behaviour or obscene language ... 78-33, 78-37, 78-38, 80-03, 80-20, 82-91, 83-19, 83-40, 83-96
Insubordination SEE Refusal to obey instructions
Lateness ... 78-07, 78-42, 79-24, 80-178, 81-85, 83-98
Leaving work without permission ... 78-11, 78-28, 79-27, 80-07, 80-36, 80-79, 80-89, 80-144, 80-151, 81-06, 81-09, 81-10, 81-30, 81-52, 81-54, 81-70, 82-17
Off-duty conduct ... 78-24, 80-118
Criminal conduct ... 78-24
Personal appearance ... 78-21
Refusal to cross picket line ... 79-43, 79-46
Refusal to obey instructions ... 78-23, 78-36, 78-38, 79-19, 79-23, 79-26, 79-33, 79-45, 80-11, 80-28, 80-36, 80-39, 80-53, 80-65, 80-83, 80-84, 80-93, 80-169, 81-07, 81-16, 81-20, 81-36, 81-68, 81-84, 81-86, 81-91, 81-94, 81-103, 81-120, 82-01, 82-19, 82-28, 82-34, 82-75, 82-78, 82-87, 83-10, 83-22, 83-53, 83-70, 83-75, 83-77, 83-96, 83-102
Health and safety ... 80-11, 81-07, 81-84, 83-09, 83-102
Leave of absence ... 82-17
Personal appearance ... 82-19
Reasonable personal excuse ... 78-11, 79-33, 80-109, 83-102
Sleeping on the job ... 80-18, 81-22

Discipline and discharge
  -Grounds for
    Refusal to obey instructions
      Theft ... 78-05, 78-37, 80-12, 80-55, 80-131, 80-165, 80-166, 81-62, 81-79, 82-99, 82-106, 82-109, 83-05, 83-23, 83-52, 83-55, 83-71, 83-72, 83-108
      Unlawful strike ... 80-73, 80-87, 80-93, 80-141
        Hot cargo or struck work clause ... 79-43, 79-46
      Work overtime ... 78-42, 79-10
        Compulsory overtime ... 79-10, 80-151
      Work performance ... 82-32, 82-87, 83-30
        Carelessness ... 78-20, 80-112, 80-171, 81-08, 82-19, 82-33, 82-37, 83-37, 83-56
        Incompetence ... 79-11, 79-26, 79-33, 80-53, 80-89, 80-168, 80-171, 81-20, 81-28, 81-119, 81-124, 83-15, 83-22, 83-30, 83-90
        Isolated occurance ... 83-112
        Unsuitability ... 78-21, 79-11, 79-33, 81-67, 83-15
    Sexual harassment ... 81-01
  -Just cause ... 79-18, 79-19, 79-27, 79-36, 79-59, 80-03, 80-08, 80-11, 81-01, 81-99, 82-05, 82-63, 83-37
  -Obligation of explanation ... 83-05, 83-23, 83-75
  -Prior warning ... 81-52, 81-54
  -Procedural limitations on discipline ... 79-32, 80-40, 81-14, 82-30, 82-42, 82-95, 83-32
  -Quit distinguished ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97
  -Raising new grounds ... 79-18, 79-32
  -Union officials ... 82-100
    Responsibility for conduct of others ... 79-47, 80-170
  -Warning
    Failure to warn ... 78-07, 78-20, 78-23, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44, 81-124, 82-33, 83-15, 83-37, 83-77, 83-108, 83-112
    Warning as discipline ... 79-43, 80-02, 83-116
Discrimination ... 82-03, 82-48, 82-63
  -Age ... 79-37, 80-63, 81-39
  -Discipline ... 78-21, 81-32, 81-91, 82-19, 82-78, 82-100
    Unlawful strike ... 78-21, 79-48, 80-141, 82-100
  -Sex
    Work assignment ... 80-14
Documents SEE Evidence
Duty of fair representation ... 79-32, 80-57
Employee
  -Defined ... 79-13
    Independent contractor distinguished ... 80-127, 82-65
  -Disability ... 82-114, 83-06, 83-09, 83-71
  -Disciplinary penalties SEE Disciplinary penalties
  -Employment status
    Absent due to illness ... 78-13, 78-14, 78-29, 79-42
    Layoff ... 83-29
    Strike ... 83-24
  -Probationary employee SEE Probationary employee
Employer grievance ... 78-30, 78-32, 78-45, 79-12, 79-35, 79-47, 79-51, 80-57

Employment record SEE Disciplinary penalties; Discipline and Discharge
Employment status SEE Employee
Estoppel ... 80-24, 80-59, 80-61, 80-74, 81-65, 81-71, 81-97, 82-58, 82-92, 82-95, 82-98, 83-01, 83-13, 83-16, 83-18, 83-19, 83-24, 83-39, 83-54, 83-81, 83-88
  -Change of grounds ... 82-70
  -Delay in complaining of grieving ... 83-28, 83-31, 83-48
  -Individual contracts ... 80-24
  -Issue estoppel SEE Resjudicata
  -Oral agreement ... 81-71
  -Procedural irregularities not object to ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-26, 83-19
Evidence ... 80-101
  -Admissibility ... 82-87
    Relevance ... 80-176, 82-69
  -Board of Arbitration
    Seeking evidence ... 79-03, 79-05
  -Burden of proof ... 79-25, 79-40, 79-43, 82-56, 82-86, 83-04, 83-26, 83-30, 83-50, 83-51, 83-55, 83-84, 83-88, 83-104
    Applications
      Demotion ... 79-11, 79-19, 79-36
        Nondisciplinary ... 78-21
      Discipline ... 83-55
      Illness ... 83-82
        Qualifying for benefits ... 78-13, 79-60, 80-56, 80-123
        Return to work ... 78-14, 80-104
  -Burden, weight of ... 80-12, 80-16
    Disciplinery cases ... 78-05, 80-55, 80-131, 80-165, 80-166
  -Documents
    Admission into evidence ... 83-03
  -Presentation of evidence
    Examination of witness
      Re-examination ... 80-101
  -Types of evidence
    Extrinsic evidence ... 79-21, 79-44, 80-158, 82-71, 83-27, 83-45
      Types of negotiating history ... 80-54, 82-71, 83-54, 83-111
      Types of past practice ... 79-14, 80-04, 80-33, 80-58, 80-93, 80-96, 80-125, 81-65, 81-71, 81-72, 81-73, 81-75, 81-77, 81-115, 82-71, 82-83, 82-85, 83-16, 83-33, 83-59, 83-67, 83-87, 83-94, 83-95, 83-115
    Medical records ... 78-14, 80-104
  -Weighing the evidence ... 80-18, 80-79
  -Witness SEE Witness
Examinations SEE Skill and ability
Foremen SEE Supervisors
Fringe benefits ... 78-29, 78-32, 78-43
Functus officio ... 82-79, 83-89
Grievance
  -Abandonment SEE ALSO Laches
  -Abandonment ... 78-17, 79-50, 79-54, 80-52, 83-42
  -Arbitrability SEE Arbitrability
  -Form of grievance ... 78-32, 80-62, 80-82, 80-105, 81-27, 81-49, 81-126, 83-14, 83-19, 83-42, 83-105

Grievance
  -Group grievance ... 78-32, 82-71, 83-74, 83-105
  -Particularily SEE Particulars
  -Policy grievance ... 78-32, 79-25, 80-23, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111
  -Settlement of grievance ... 78-17, 79-22, 79-50, 79-54, 83-17, 83-51, 83-98
  -Withdrawal of grievance ... 78-17, 79-21, 79-50, 79-54, 80-52, 83-17, 83-42
Grievance arbitration
  -Nature of the process ... 79-23, 82-25
Grievance procedure
  -Compliance with ... 78-30, 78-32, 78-45, 79-12, 79-51, 80-57, 82-42, 82-85, 83-103
  -Discipline procedures ... 82-30, 82-42
  -Procedural limitations on arbitrability SEE Arbitrability
  -Relief against non-compliance ... 78-45, 79-43, 79-57, 80-26, 80-168
  -Time limits SEE Time limits
  -Union control of ... 79-32, 80-57
  -Waiver of irregularities ... 79-34, 79-51, 79-55, 79-60, 80-19
Grievor
  -Ceasing to be employee (includes deceased) ... 82-109
Health plans SEE Insurance and welfare plans
Holiday pay SEE Statutory holidays
Hours of work SEE Working hours and shifts
Human Rights Act - Discrimination ... 80-63
Illegal strike SEE Strikes and lockouts
Illness or disability
  -Benefits SEE Insurance and welfare plans
  -Burden of proof
    Qualifying for benefits ... 78-13, 79-60, 80-56, 80-123, 80-148, 83-69, 83-116
    Return to work ... 78-14, 80-104, 82-96
  -Effect on employee
    Ability to do job ... 79-37, 79-51, 80-14, 80-63, 82-114
    Absence from work ... 80-120, 81-69, 82-05, 83-06, 83-09
  -Employer response
    Alternatives to termination
      Absenteeism ... 81-106, 83-06, 83-09, 83-26, 83-82
      Inability to work properly ... 81-61, 82-114, 83-09, 83-71
    Discipline
      Absenteeism ... 79-02, 80-136, 81-69, 81-106, 83-06, 83-09
      Inability to work properly ... 83-09, 83-71
  -Employment status ... 78-13, 78-14, 78-29, 79-42, 82-25, 82-26
  -Entitlement to a job ... 78-14, 82-96
  -Holiday pay
    Entitlement ... 80-137, 80-174
  -Medical examinations ... 79-04, 80-123, 80-148, 82-25, 82-26
  -Return to work ... 78-14, 80-136, 80-155, 81-78
  -Sick leave SEE ALSO Leave of absence
  -Sick leave ... 82-25, 82-26
  -Vacations
    Entitlement ... 79-42, 79-61, 80-13, 82-110

Incentive rates
 -Establishment and termination ... 82-10
 -Setting or altering the rate ... 81-102
Independent contractors SEE Contracting out
Individual contracts of employment SEE Contracts of employment
Industrial Safety Act ... 82-102
Insubordination SEE Discipline and discharge
Insurance and welfare plans
 -Entitlement to benefits ... 78-13, 79-60, 80-56, 80-123, 82-57, 82-110, 83-69, 83-91, 83-116
 -Incorporation into collective agreement ... 83-13
 -Payment of premiums ... 80-27, 82-45, 82-54, 83-63
Interest arbitration
 -Authority to decide interest disputes ... 80-70
 -Distinguished from grievance arbitration ... 78-25, 78-26, 80-146
 -Wage disputes ... 80-70
Interpretation ... 78-16, 78-39, 78-46, 79-14, 79-16, 79-17, 79-20, 79-25, 79-35, 79-42, 79-44, 79-53, 80-04, 80-15, 80-35, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-154, 80-156, 81-03, 81-11, 81-15, 81-17, 81-18, 81-19, 81-34, 81-44, 81-76, 81-77, 81-90, 81-93, 82-10, 82-20, 82-105, 82-113, 82-116, 83-16, 83-33
 -Administrative feasibility ... 80-15, 80-17
 -Aids to interpretation ... 83-41
  Dictionaries ... 83-11, 83-44
  Prior agreements ... 83-87
  Prior awards and court decisions ... 83-21
 -Context ... 79-25, 79-35, 79-42, 80-15, 82-23, 82-38, 82-82, 82-93, 83-20, 83-61, 83-84
 -Definitions ... 80-126, 80-128
 -Dictionaries ... 83-11
 -Extrinsic evidence SEE Evidence
 -Intention of the parties ... 78-39, 78-46, 79-35, 79-42, 80-04, 80-15, 80-17, 80-35, 80-39, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-150, 80-154, 80-156, 81-40, 82-12, 82-13, 82-27, 82-29, 82-67, 82-76, 82-94, 83-03, 83-11, 83-12, 83-14, 83-21, 83-27, 83-29, 83-33, 83-36, 83-39, 83-54, 83-59, 83-61, 83-63, 83-65, 83-68, 83-78, 83-86, 83-87, 83-92, 83-97, 83-110, 83-115
 -Statutes
  As aid to interpretation ... 78-16
 -Words and phrases ... 82-10, 82-20
  And ... 80-35
  Day or work day ... 83-63
  Jobs and classification
   Job ... 82-38
  Measurement of time
   Day or work day ... 80-150
Job classifications and descriptions
 -Bargaining unit work defined by ... 79-13, 79-38, 80-09, 80-21, 80-47, 80-102, 80-113
 -Creation or revision ... 81-100, 81-104, 82-41, 82-72, 82-73, 82-117, 83-01, 83-03, 83-12, 83-39, 83-76
  Bona fides ... 79-06, 82-29, 82-76, 82-82, 82-94
  Change of work load ... 80-46, 82-31, 83-49
  Collective agreement limitations ... 83-111
 -Interpretation SEE Interpretation
 -Performance of work outside SEE Work assignment
 -Skill and ability SEE Skill and ability

Job descriptions SEE Job classifications and descriptions; Job posting; Work assignment
Job posting SEE ALSO Promotion, demotion and transfer; Skill and ability
Job posting ... 78-06, 78-35, 79-01, 79-15, 80-143, 80-176, 81-76, 81-122, 81-123, 81-125, 81-126, 81-127, 81-128, 82-24, 82-51, 83-20, 83-31, 83-100
 -Bona fides ... 79-06
 -Job description posted ... 82-24, 82-41
 -Posting procedure .. 78-35, 79-01, 80-143, 80-176, 81-29, 82-51, 83-100
 -Vacancy ... 79-01, 80-19, 80-34, 80-98, 80-143, 80-176, 82-81, 83-20
  Withdrawal ... 79-01
Judicial review ... 80-29, 80-48, 80-77, 80-86, 80-146, 81-51, 82-51, 82-52
 -Arbitral discretion ... 80-29
 -Consenual arbitration ... 80-29, 80-86
 -Grounds for review
  Error of law on face of record ... 81-51
 -Impartiality ... 78-15, 79-32, 79-55
 -Standard of review of arbitral interpretation ... 81-107, 81-108
 -Statutory arbitration ... 80-146
Jurisdiction
 -Arbitral costs ... 80-09
 -Arbitrability SEE Arbitrability
 -Concurrent jurisdiction
  Administrative agencies ... 80-85
 -Damages SEE Remedies
 -Estoppel SEE Estoppel
 -Interpretation of statutes ... 83-113
 -Rectification ... 79-22
 -Sources
  Collective agreement ... 83-85, 83-86
  Statutes ... 82-70, 82-95, 83-113
  Submission to arbitration ... 79-12, 79-22, 83-14
Jurisdictional dispute ... 80-121
Laches ... 80-88, 80-124, 83-28, 83-31, 83-48, 83-93
Layoff ... 78-10, 78-19, 78-26, 80-100, 82-64, 82-102, 82-103, 82-115, 83-18, 83-29, 83-47
 -Bumping ... 78-26, 80-72, 80-145, 80-163, 80-167, 82-13, 82-14, 82-102, 82-103, 82-115, 83-18, 83-47, 83-101, 83-106
  Upwards ... 80-26, 80-72, 80-167
 -Burden of proof ... 83-88
 -Defined ... 80-100
 -Entitlement to benefits
  Holiday pay ... 83-34
 -For less than one shift ... 80-100, 80-108
 -Notice ... 78-19, 82-62, 83-28
 -Recall SEE Recall
 -Reduction of hours ... 79-41, 80-100
 -Seniority
  Applied ... 80-100, 82-07, 82-102, 82-103, 82-115, 83-18, 83-47, 83-49, 83-64, 83-83
 -Skill and ability SEE Skill and ability
 -Status of person ... 83-34
Leave of absence SEE ALSO Bereavement leave; Illness or disability

Leave of absence ... 78-42, 80-38, 81-89, 81-97, 82-03
  -Unauthorized ... 80-109, 80-115
  -Union business ... 83-51
Lockouts SEE Strikes and lockouts
Lord's Day Act ... 80-151
Lunch breaks
  -Overtime ... 79-40
Management rights ... 79-17, 79-23, 79-25, 80-06, 80-123, 81-13, 81-29, 82-102, 83-49, 83-60, 83-116
  -Overtime ... 83-107
  -Work assignment ... 78-35, 79-01, 79-06, 79-30, 80-75, 80-114, 83-80
Maternity leave SEE Pregnancy
Medical examinations ... 79-04, 80-123, 82-52
Medical plans SEE Insurance and welfare plans
Medical records SEE Evidence
Memorandum of agreement SEE Collective agreement
Natural justice SEE Judicial review
Negotiating history SEE Evidence
Notice of hearing ... 80-19, 82-89
Nova Scotia
  -Legislative framework ... 81-63
Onus of proof SEE Evidence
Overtime
  -Burden of proof ... 82-29, 83-25
  -Compulsory ... 78-34, 79-10, 79-49, 80-151, 82-58
  -Defining overtime ... 83-81
    Daily overtime ... 78-22, 78-43, 79-52, 80-25, 80-150, 81-72, 81-74, 82-67, 83-111, 83-115
    Overtime hours worked ... 79-40, 79-52, 80-25, 80-125, 80-175, 82-23, 82-44, 83-68, 83-87
    Qualifying time ... 79-40, 79-44, 79-52, 83-94
    Weekly overtime ... 78-22, 82-67, 83-65, 83-97
  -Distribution of overtime
    Equitable distribution ... 82-59, 83-107
    Persons normally performing ... 79-49, 80-58, 81-17, 81-112, 82-80
  -Management rights ... 81-77, 81-121, 81-130, 82-18
  -Premiums ... 79-52
  -Refusal to work ... 78-39, 78-41, 79-10, 80-64, 80-151, 81-105, 82-58
  -Remedies ... 81-47, 82-43, 82-80, 82-85
  -Right to claim ... 78-44, 79-40, 79-49, 80-95, 80-159, 80-175, 80-177, 81-47, 81-112, 81-129, 81-130, 82-18, 82-29, 82-83, 83-25, 83-99
    Equitable distribution ... 78-09, 78-44, 79-49, 82-04, 82-58, 82-101
  -Scheduling ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-49, 80-64, 83-02, 83-111, 83-115
  -Statutory holiday ... 79-44, 80-126, 82-11, 82-111
  -Voluntary ... 78-34, 79-10, 79-49, 80-151, 82-58
Overpayment ... 80-88
Part-time employee ... 81-88, 82-36, 82-69, 82-110, 83-46, 83-49, 83-50, 83-73, 83-91
Parties & participants ... 83-18
  -Bringing grievance ... 81-41, 82-04
Past practice SEE Evidence; Estoppel
Pension plans ... 82-06, 82-45, 82-54
  -Benefits ... 78-04, 78-25, 79-09, 82-111, 83-13, 83-27

Personal appearance regulations ... 78-21
Picket lines
  -Refusal to cross ... 79-43, 79-46
Policy grievance
  -Nature of ... 78-32, 79-25, 80-23, 81-14, 81-21, 82-47, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111
Practice SEE Procedure
Precedent
  -Prior award ... 79-31, 79-32
Pregnancy
  -Leave
    Vacation pay ... 82-113, 83-33
  -Medical benefits ... 81-61, 81-108
Preliminary objection SEE Procedure
Probationary employee ... 80-147, 81-37, 81-53
  -Discipline or discharge ... 79-24, 80-23, 81-37, 81-53, 82-15, 83-30
    Arbitrability ... 79-24, 81-37
  -Probationary period ... 80-152, 82-27, 83-73
Procedure SEE ALSO Evidence
  -Adjournments SEE Adjournments
  -Order of procedure
    Resignation ... 78-07, 79-59, 80-37, 80-39
  -Powers of Board Arbitration
    Relief against time limits ... 78-45, 79-43, 79-51, 80-26, 80-103, 80-168
  -Preliminary objections ... 79-03, 79-05, 79-31, 79-32, 79-57, 80-32, 80-78, 80-94, 80-157, 80-173, 81-12, 81-21, 81-24, 81-27, 81-103, 81-123, 82-06, 82-08, 82-57, 82-58, 82-70, 82-71, 82-77, 82-85, 83-14, 83-15, 83-19, 83-31, 83-48, 83-51, 83-66, 83-109
  -Prior award ... 82-58, 82-85, 82-86, 82-92
Promotion, demotion and transfer
  -Demotion or transfer
    Defined ... 79-30, 79-37, 80-98, 83-26, 83-92, 83-114
    Disciplinary ... 79-20, 81-91
    Non-disciplinary ... 78-21, 83-26, 83-57, 83-90
      Absenteeism or inability to work ... 83-26
      Bona fides ... 83-47
      Incompetence ... 80-06
      Into unit ... 79-30
      Union activity ... 81-29
  -Promotion defined ... 78-06, 79-15, 79-37, 80-01, 83-92
  -Promotion or transfer outside unit ... 79-28, 79-29
  -Seniority ... 78-18, 78-27, 79-15, 79-17, 79-28, 79-29, 79-37, 79-51, 80-01, 80-10, 80-69, 81-91, 81-95, 81-122, 81-123, 81-125, 81-126, 81-127, 81-128, 82-68, 82-76, 82-93, 82-94, 83-03, 83-57, 83-76, 83-84
  -Skill and ability SEE Skill and ability
  -Union officials ... 78-18
Quit SEE Resignation
Recall ... 79-31, 80-69, 82-64, 83-31, 83-76, 83-103
  -Seniority ... 78-10, 79-31, 79-51, 80-69, 82-64
  -Skill and ability SEE Skill and ability
  -Striking employees ... 82-64
Reinstatement ... 79-59, 82-96, 82-97, 82-23, 83-108

Remedies
-Authority to award ... 80-116, 80-140, 82-22, 82-79, 83-51, 83-61, 83-86, 83-89
Substitution of penalties ... 83-23
-Type of grievance ... 79-49
Discharge or suspension ... 82-22
Overtime ... 82-43, 82-79, 82-80, 82-85
Work assignment outside unit ... 81-48, 82-35
-Type of remedy
Compliance order ... 83-13
Damages
Authority to award ... 80-84, 82-79, 83-51, 83-61
Measure ... 82-50
Mitigation ... 82-22
Punitive damages ... 80-116, 81-04
Rectification ... 79-22
Reinstatement ... 79-59, 82-96, 82-97, 82-99
Restitution and set-off ... 79-59
Substitution of lesser penalty ... 79-59, 82-96, 82-97, 82-99
Res Judicata
-Abandonment, settlement and withdrawal ... 79-31
-Decisions of other Boards of Arbitration ... 79-31, 79-32, 81-19, 81-31, 81-38, 83-55
-Issue estoppel ... 79-32, 82-58, 82-85, 82-86, 82-92
Resignation ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97, 83-72
Rest breaks ... 80-140, 83-61
Retirement ... 82-21
Retroactivity ... 80-13, 80-122, 82-88
-Wage schedules ... 80-96, 82-88
Rules SEE Company rules
Safety ... 83-60
-Equipment and clothing ... 83-102
Schedules SEE Working hours and shifts
Seniority ... 78-10, 79-17, 79-58, 80-01, 80-10, 81-76
-Acquisition ... 78-30, 80-132, 83-48
Non-unit employees ... 78-01, 83-58, 83-85, 83-114
Non-working periods ... 83-64
-Applications ... 79-37, 80-01, 81-80, 82-90, 82-102, 82-103, 83-18
Layoff ... 78-10, 78-19, 78-26, 79-51, 80-74, 80-100, 81-57, 82-07, 82-102, 82-103, 82-115, 83-18, 83-47, 83-49, 83-64, 83-83
Bumping ... 78-26, 80-72, 81-57, 82-102, 82-103, 82-115, 83-18, 83-47, 83-62
Promotion, demotion and transfer SEE ALSO Promotion, demotion and transfer
Promotion, demotion and transfer ... 78-18, 78-27, 79-17, 79-28, 79-29, 80-01, 80-10, 81-91, 81-95, 82-68, 82-76, 82-93, 82-94, 83-03, 83-57, 83-84, 83-100
Recall ... 79-31, 79-51, 80-69, 83-31, 83-103
-Loss of seniority SEE Disciplinary penalties
-Skill and ability SEE Skill and ability
-Termination of seniority ... 78-26, 78-30, 83-71
-Union officials ... 78-18, 80-74, 81-40

Shifts SEE Working hours and shifts
Sick leave SEE Illness or disability
Sick pay SEE Insurance and welfare plans
Skill and ability ... 78-06, 78-10, 78-18, 78-27, 79-15, 79-51, 80-10, 80-14, 80-66, 80-97, 80-129, 81-13, 81-35, 82-61, 82-68, 83-25, 83-62, 83-103
  -Arbitral review ... 78-18, 79-15, 79-51, 80-06, 80-10, 80-97, 80-129, 81-122, 81-125, 81-126, 81-127, 81-128, 82-61, 82-68, 83-36, 83-58, 83-79, 83-83
    Senior employee if relatively equal ... 80-14, 80-106, 80-160, 81-125, 81-126, 81-127, 81-128, 83-73, 83-79
    Senior employee with required ability ... 78-10, 78-18, 79-51, 80-69, 80-72, 80-145, 80-163, 80-167, 81-25, 81-35, 81-39, 82-07, 82-61, 82-90, 83-31, 83-36
  -Burden of proof ... 78-18, 78-27, 79-51, 80-14, 80-106, 81-25, 81-39, 81-127, 81-128
  -Criteria of ability and qualifications ... 83-08, 83-79, 83-100, 83-106
    Aptitude ... 83-79
    Bona fides of ... 78-18, 79-15, 80-67, 81-122
    Disciplinary record ... 78-27
    Education ... 80-72
    Physical capabilities ... 79-37, 79-51, 80-14, 80-63
  -Discrimination
    Age ... 80-63
    Sex ... 80-14
  -Examinations and tests ... 78-06, 80-66, 83-03, 83-100
  -Interpretation SEE Interpretation
  -Trial, training and familiarization period ... 80-145, 80-160, 80-163, 80-167, 81-25, 81-39, 82-61, 83-10, 83-47, 83-74, 83-101
Standard of proof SEE Evidence
Statutes
  -Aid to interpretation ... 78-16
  -Applied by Board of Arbitration ... 82-55, 83-113
Statutory holidays ... 81-73
  -Holiday falling on non-working day ... 80-33, 80-49, 83-43
  -Holiday pay and other benefits ... 80-137, 81-55, 82-11, 83-21
    Computation of vacation pay ... 78-32, 79-61
  -Qualifying days ... 78-03, 79-14, 80-174, 83-105
    Illness ... 80-174
    Layoff ... 83-34, 83-105
  -Work on day of holiday ... 79-44, 80-126, 81-19, 82-11
Strikes and lockouts ... 82-58, 83-113
  -Hot cargo and struck work clauses ... 79-43, 79-46
  -Unlawful strikes
    Discipline ... 79-47, 80-73, 80-87, 80-93, 80-141
      Union officials ... 79-47, 80-87
    Union liability ... 81-110, 82-47
Submission to arbitration SEE Grievance
Supervisors
  -Bargaining unit SEE Work assignment
  -Return to unit
    Seniority ... 78-01
Supervisory
  -Excluded by recognition clause ... 83-66

Suspension SEE Discipline and discharge
Temporary employee ... 81-83, 82-36, 83-46
Termination SEE ALSO Discipline and discharge
  -Illness or disability SEE Illness or disability
  -Resignation SEE Resignation
  -Work not available ... 83-73
Tests SEE Skill and ability
Time limits
  -Continuing grievance ... 78-30, 78-32, 78-40, 79-48, 79-51, 79-55, 79-60, 80-29, 80-103, 83-81
  -Delay ... 80-77, 80-124, 81-27, 81-110, 83-28, 83-31, 83-48, 83-109
  -Mandatory or directory ... 78-40, 79-34, 79-48, 79-60, 80-19, 80-52, 80-86, 30-94, 80-103, 80-124, 80-149, 81-12, 81-110, 82-47, 82-77, 82-88, 82-109, 83-13, 83-28, 83-31, 83-48, 83-83, 83-109
  -Relief against non-compliance ... 78-45, 79-43, 79-57, 80-26, 80-149, 80-168
  -Restriction on arbitrability ... 82-71
  -Waiver of ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-103
Trade union SEE Union
Trade Union Act ... 80-57, 80-119, 82-56, 83-13
Trade Union Act, s. 5.41 (d) ... 82-22
Trade Union Act, s. 7 ... 82-29
Trade Union Act, s. 33 ... 81-06
Trade Union Act, s. 39 ... 82-92
Trade Union Act, s. 40 (1) ... 81-37
Trade Union Act, s. 41 ... 83-23
Trade Union Act, s. 89 (c) ... 83-07
Trade Union Act, s. 103 ... 83-07
Training periods ... 80-145, 83-10, 83-47, 83-74, 83-78
Transfers SEE Promotion, demotion and transfers
Travel allowance ... 80-24, 81-49, 81-64, 82-48, 83-44
Unemployment Insurance Act ... 82-22
Union
  -Activity and business
    On employer premises ... 79-35
  -Dues
    Check off ... 78-47, 79-39, 80-09, 80-42, 80-62, 81-63, 81-113
  -Grievance ... 79-25, 80-57
  -Liability for unlawful strike ... 82-47, 82-100
    Damages ... 82-47
    Provocation ... 82-100
    Vicarious responsibility ... 81-92
  -Officials ... 79-47, 82-100
    Discipline
      Responsibility for action of others ... 79-47
  -Recognition ... 79-58
  -Rights ... 78-47, 80-21, 82-66, 83-11
  -Security ... 80-22, 82-116, 83-11, 83-45
    Check off ... 78-47, 79-39, 80-42, 80-135, 82-02, 82-06, 82-16, 82-38, 82-45, 82-66, 82-69, 82-89, 82-92
    Remedies
      Damages ... 82-108
  -Supplying employees ... 81-115, 82-116

Unlawful strike SEE Strikes and lockouts
Vacancy ... 79-01, 80-19, 80-98, 81-49, 81-88, 82-81, 83-20, 83-42, 83-49
  -Job posting ... 78-35, 79-01, 79-15, 80-34, 80-143, 80-176, 83-20
Vacation ... 79-21, 79-61, 81-15, 81-60, 82-111
  -Computation of vacation and vacation pay ... 78-32, 79-61, 81-56, 81-59, 82-98, 83-24
    Period of service ... 78-32, 79-21, 79-61, 80-80, 81-56
  -Earning defined ... 78-32, 79-61, 81-15
  -Other benefits ... 82-110
  -Scheduling ... 80-90, 80-110, 80-130, 83-86
Wages ... 78-02, 78-08, 79-08, 79-56, 83-74, 83-78
  -Alteration of wages ... 83-41, 83-91, 83-92
  -Arbitration of rates ... 81-101, 81-118
  -Equal work for equal skill ... 83-38
  -Guaranteed weekly wage ... 78-08, 79-08, 82-71, 82-74
  -Increases
    Educational or experiential increments ... 82-88
    Progressive wage increases ... 81-93, 83-46
  -Overtime pay SEE Overtime
  -Rates for new and revised classifications ... 83-38, 83-39
  -Reporting pay SEE Call-in pay
  -Retroactivity SEE Retroactivity
  -Setting rate ... 81-118
  -Time not worked ... 82-71
  -Witholding wages ... 81-96, 83-95
Waiver ... 79-34, 79-51, 79-55, 79-60, 80-19, 82-57, 82-71, 83-07, 83-19, 83-32
  -Estoppel distinguished ... 80-26
Warning SEE Disciplinary penalties
Welfare plans SEE Insurance and welfare plans
Words and phrases SEE Interpretation
Work assignment SEE ALSO Job classifications and descriptions
  -Bargaining unit work ... 78-03, 79-13, 79-38, 80-09, 80-21, 80-47, 80-71, 80-75, 80-102, 80-113, 81-46, 81-48, 82-76, 82-81, 82-93, 83-04, 83-07, 83-47, 83-66, 83-67, 83-84
  -Compliance with wage structures ... 81-65, 82-41, 83-80
  -Contracting out ... 81-31, 81-45, 82-65
    Employees outside unit ... 79-06, 79-13, 80-47, 80-76, 80-102, 80-121, 81-27, 81-33, 81-46, 81-121, 82-18, 82-29, 82-35, 82-65, 82-66, 82-83, 82-84, 82-116, 83-04, 83-11, 83-45, 83-60
      During lay-off ... 78-03, 79-31, 82-84
    Employees within unit ... 81-66, 81-75, 82-69, 83-49, 83-80
  -Location ... 79-01, 80-176
Working hours and shifts ... 78-12, 78-31, 78-44, 79-41, 79-49, 80-64, 81-77, 81-116, 82-09, 82-23, 82-60, 82-73, 83-02, 83-16, 83-65, 83-111, 83-115
  -Definition of work day defined ... 80-39
  -Reduction of hours ... 79-41
Workmen's Compensation Act ... 82-57

PART 3

EMPLOYER & UNION INDEX

EMPLOYER & UNION INDEX

A. R. Hemming Building Systems Limited ... 81-28
Abbie J. Lane Memorial Hospital ... 78-31, 81-103
Acadia University ... 78-32, 80-151, 81-01, 83-80
Acadia University Faculty Association ... 81-01
Aberdeen Hospital Commission ... 79-30
Alder Point Construction Limited ... 81-48
All Saints Hospital ... 81-12
Allwood Products Limited ... 82-84
Alton Power Limited ... 80-85
Amalgamated Transit Union, Division 508 ... 79-29, 80-41, 81-53, 82-63, 82-109, 83-70
AMCA Engineering ... 83-48
Annapolis Regional Schools, Board of Trustees ... 81-97
Antigonish Town ... 78-40, 79-31
Arrow Building Corp. Limited ... 81-42
Associated Freezers of Canada Limited ... 81-85, 82-62
Association of Commercial and Technical Employees, Local 1670 ... 80-13, 81-102
Association of Supervisory Employees and Associates ... 80-135
Atlantic Bridge Co. Limited ... 81-45
Atlantic Concrete Limited ... 81-49
Atlantic Oil Workers, Local 1 ... 83-60
Atlantic Spring & Machine Shop ... 83-90
Atlantic Wholesalers Limited ... 78-33, 79-13
Atomic Energy of Canada ... 78-34, 78-35, 80-103, 80-135, 81-56
Atomic Energy of Canada (Glace Bay Heavy Water Plant) ... 80-135
Atomic Energy of Canada (Port Hawkesbury Water Plant) ... 82-83
B. G. Checo International Limited and Electric Dawcolectric Limited ... 81-96
Bakery Confectionery and Tobacco Workers' Union, Local 446 ... 80-12, 80-98, 81-105, 82-33, 82-42, 82-89, 83-05, 83-105
Basic Wholesale Foods (Port Hawkesbury, N.S.) ... 82-115
Bedford Masonry Contractors Limited ... 80-50, 81-113
Bendix Home Systems Limited ... 80-49, 80-124, 80-174
Ben's Limited ... 80-98
Board of Governors of College of Cape Breton ... 78-46, 79-46, 80-69, 82-105
Board of Governors of Dalhousie College and University ... 81-82, 81-93, 82-69
Board of Management of the Cape Breton Hospital ... 80-138
Board of Police Commissioners, City of Sydney ... 83-86
Board of School Commissioners of City of Dartmouth ... 78-25
Board of School Commissioners of the Northside Victoria Amalgamated Board ... 81-89
Board of Trustees of the Annapolis Regional Schools ... 81-97
Bolands Limited ... 79-07, 80-12, 83-05
Bowater Mersey Paper Co. Limited ... 81-77, 83-88
Branch 18, Administrative Support and Nova Scotia Government Employees' Association ... 78-46, 79-46
Bread, Cake, Biscuit, Crackers, Candy and Confectionery and Miscellaneous Workers, Local 446 ... 78-08, 78-33, 79-07
Brewery and Soft Drink Workers, Local 361, Halifax, of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers ... 79-42

Brookfield Foods Limited ... 78-41, 81-105, 82-11, 83-49

Brown & Root Limited ... 81-107

Buchanan Masonry Limited ... 82-06, 82-54

T. P. Calkin ... 81-46

Camp Hill Hospital ... 82-70, 82-100, 83-59

Canada Catering Company Limited ... 80-39

Canada Cement LeFarge ... 83-101

Canada Post Corp. ... 82-86, 82-87, 82-110, 83-30, 83-42, 83-98, 83-107

Canadian Air Line Employees Assoc. ... 82-76, 82-104, 83-02

Canadian Brotherhood of Railway, Transport and General Workers ... 80-55, 82-30, 83-21, 83-28

Canadian Brotherhood of Railway, Transport and General Workers, Local 230 (b) ... 83-35

Canadian Brotherhood of Railway, Transport and General Workers, Local 503 ... 82-11

Canadian Brotherhood of Railway, Transport and General Workers, Local 504 ... 83-24

Canadian Brotherhood of Railway, Transport and General Workers, Local 506 ... 83-40

Canadian Brotherhood of Railway, Transport and General Workers, Local 507 ... 82-77, 83-06

Canadian Brotherhood of Railway, Transport and General Workers, Local 605 ... 80-177

Canadian Brotherhood of Railway, Transport and General Workers, Local 606 ... 79-52, 80-05, 80-39, 80-44, 80-123, 80-131, 80-137, 81-21, 81-55, 81-66, 81-81, 82-27, 83-58, 83-65, 83-97

Canadian Brotherhood of Railway, Transport and General Workers, Local 607 ... 78-43, 83-20

Canadian Brotherhood of Railway, Transport and General Workers, Local 608-A ... 83-109

Canadian Brotherhood of Railway, Transport and General Workers, Local 611 ... 81-118

Canadian Brotherhood of Railway, Transport and General Workers, Local 612 ... 79-47, 79-48, 79-49, 80-68, 80-108, 80-168, 80-178, 82-17, 83-99

Canadian Brotherhood of Railway, Transport and General Workers, Local 615 ... 83-09

Canadian Brotherhood of Railway, Transport and General Workers, Local 619 ... 83-108

Canadian Food and Allied Workers and the Retail Clerks' Union merged in 1980, to form the United Food and Commercial Workers' Union

Canadian Food and Allied Workers ... 79-26, 80-53

Canadian Food and Allied Workers, Local P-268 ... 78-11, 78-61, 79-55, 80-43, 80-165

Canadian Food and Allied Workers, Local 309 ... 78-09, 79-61, 80-155

Canadian Merchant Service Guild ... 82-50

Canadian Pacific Hotels ... 79-45

Canadian Paperworkers' Union ... 82-24

Canadian Paperworkers' Union, Local 141 ... 81-77, 83-88

Canadian Paperworkers' Union, Local 434 ... 82-101, 82-102

Canadian Paperworkers' Union, Local 440 ... 78-09. 78-10, 78-44, 80-72, 82-29, 82-23, 83-23

Canadian Paperworkers' Union, Local 583 ... 82-12

Canadian Paperworkers' Union, Local 972 ... 80-117
Canadian Rock Salt Company Limited ... 78-05, 80-109, 80-115, 80-129, 80-175, 81-101, 82-09, 82-10
Canadian Seafood and Allied Workers' Union ... 78-14, 78-28, 79-11, 80-107, 80-133
Canadian Seafood and Allied Workers' Union, Local 112 ... 80-73
Canadian Seafood and Allied Workers' Union, Local 118 ... 80-25
Canadian Union of Postal Workers ... 82-86, 82-87, 82-110, 83-30, 83-42, 83-107
Canadian Union of Public Employees ... 80-132, 81-03, 81-78, 81-91, 82-28, 82-32, 82-113
Canadian Union of Public Employees, Local 143 ... 78-17, 83-102
Canadian Union of Public Employees, Local 227 ... 82-18
Canadian Union of Public Employees, Local 232 ... 82-90, 83-114
Canadian Union of Public Employees, Local 741 ... 80-169
Canadian Union of Public Employees, Local 753 ... 82-05
Canadian Union of Public Employees, Local 758 ... 80-66, 83-86
Canadian Union of Public Employees, Local 759 ... 80-47, 80-94, 81-31, 81-65, 81-74
Canadian Union of Public Employees, Local 835 ... 80-10
Canadian Union of Public Employees, Local 867 ... 78-03
Canadian Union of Public Employees, Local 927 ... 83-79
Canadian Union of Public Employees, Local 933 ... 78-15, 78-45, 79-54, 80-45, 81-44, 82-41
Canadian Union of Public Employees, Local 933 - Office and Clerical Staff of the City of Sydney and the Office Clerical Staff of the Sydney Water Commission ... 79-54, 82-41
Canadian Union of Public Employees, Local 964 ... 80-38
Canadian Union of Public Employees, Local 972 ... 78-22
Canadian Union of Public Employees, Local 1027 ... 79-44
Canadian Union of Public Employees, Local 1047 .. 79-57, 80-07, 80-29, 80-37, 80-86
Canadian Union of Public Employees, Local 1069 ... 82-71
Canadian Union of Public Employees, Local 1116 ... 82-21
Canadian Union of Public Employees, Local 1146 ... 78-24
Canadian Union of Public Employees, Local 1185 ... 80-158
Canadian Union of Public Employees, Local 1218 ... 80-114, 80-127, 80-128, 83-68, 83-77
Canadian Union of Public Employees, Local 1392 ... 79-60, 80-14, 80-61, 80-102, 80-148, 80-149, 80-160, 80-176, 81-10, 81-43, 81-51, 82-99, 83-55, 83-82
Canadian Union of Public Employees, Local 1416 ... 80-97
Canadian Union of Public Employees, Local 1441 ... 80-125
Canadian Union of Public Employees, Local 1446 ... 79-28
Canadian Union of Public Employees, Local 1646 ... 79-30
Canadian Union of Public Employees, Local 1711 ... 78-21, 79-23, 80-90
Canadian Union of Public Employees, Local 1723 ... 80-91
Canadian Union of Public Employees, Local 2031 ... 83-91
Canadian Union of Public Employees, Local 2046 ... 81-62, 83-113
Canadian Union of Public Employees, Local 2336 ... 80-141
Canadian Union of Public Employees, Local 2436 ... 83-61
Canadian Union of Public Employees, Local 3010 ... 81-29, 82-94, 82-117, 83-33

Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 361 - Brewery and Soft Drink Workers ... 79-42, 80-15, 81-69, 83-08
Canso Seafoods Limited ... 81-118, 83-15, 83-16, 83-17, 83-18
Cape Breton Construction Limited ... 78-04
Cape Breton County ... 78-24, 78-28
Cape Breton County Correctional Centre ... 78-24
Cape Breton Development Corp. ... 81-62, 83-24, 83-113
Cape Breton District School Board ... 83-100, 83-114
Cape Breton Hospital ... 81-114, 82-05
Cape Breton Hospital Nurses Union ... 80-138
Cape Breton Island District Council of Carpenters Trust Fund ... 82-16
Cara Operation Limited ... 80-71, 80-166
Carey Brothers Masonry Limited ... 80-122
Celtic Construction Limited ... 80-04
T. D. Chaisson Electric (1979) Limited ... 80-24
Chateau Halifax ... 78-23, 78-30
B. G. Checo International Limited ... 81-96
Children's Aid Society ... 81-29
Children's Aid Society of Cape Breton ... 82-94, 82-117, 83-33
City of Dartmouth ... 79-12, 80-118, 80-130, 81-06, 81-08, 81-47, 82-08, 83-39, 83-89
City of Dartmouth Board of School Commissioners ... 78-25
City of Halifax ... 78-06, 78-13, 78-17, 78-18, 78-42, 79-04, 79-19, 80-56, 80-70, 80-75, 80-120, 80-144, 81-09, 81-11, 81-15, 81-37, 81-52, 81-54, 81-70, 81-111, 82-15, 82-58, 82-75, 82-81, 83-102
City of Halifax, The Halifax Forum Commission, Directors of Point Pleasant Part ... 80-34, 80-150
City of Sydney ... 78-15, 78-45, 79-54, 80-45, 80-47, 80-66, 80-94, 81-31, 81-44, 81-65, 81-74, 82-41
City of Sydney, Board of Police Commissioners ... 83-86
Civil Service Arbitration Board ... 80-02
Civil Service Joint Council Act ... 80-02, 80-153
Clerical Staff of City of Sydney and the Office and Clerical Staff of the Sydney Water Commission and Canadian Union of Public Employees, Local 933 ... 79-54
Callavino - McCall Contractors Limited ... 82-20
Coca-Cola Limited ... 83-08
Colchester - East Hants Amalgamated School Board ... 79-57, 80-07, 80-29, 80-37, 80-86
Colchester Hospital ... 83-111
John D. Coleman, Masonry Limited ... 80-121
College of Cape Breton ... 78-46, 79-46, 80-69, 82-36, 82-105
Community Hotel Limited ... 80-89
Comstock International Limited ... 79-41
Connors Bothers Limited ... 80-154, 82-78
Construction Association Management Labour Bureau ... 79-08, 79-09, 79-34, 79-35, 79-41, 79-56, 81-115, 82-39, 82-48, 82-49, 82-66, 82-92, 82-116, 83-07, 83-11, 83-25, 83-27
Co-op Atlantic Building Supplies, Department - Sydney ... 81-25
Co-op Atlantic, Feed Plant ... 81-57
Corporation of the Town of Antigonish ... 78-40, 79-31

Correction Officers Association of Nova Scotia ... 80-01, 81-41, 83-26
Correction Officers Association of Nova Scotia, Local 5 ... 83-72
Crossley Karastan Carpet Mills Limited ... 79-47, 79-48, 79-49, 80-68, 80-108, 80-168, 80-178, 82-17, 83-28, 83-31, 83-99
Cumberland County Correctional Centre ... 82-37
Cumberland County Municipality ... 82-37
Dalhousie College and University ... 79-05, 79-06, 79-43, 79-50, 80-14, 80-61, 80-160, 80-176, 81-10, 81-24, 81-43, 81-51, 82-69, 83-55, 83-81, 83-82
Dalhousie Faculty Association ... 81-82, 81-93, 82-69
Dalhousie Staff Association ... 79-05, 79-22, 79-50, 81-24, 81-100, 82-74, 83-81
Dalhousie University ... 79-22, 260, 80-78, 80-88, 80-102, 80-148, 80-149, 81-100, 82-03, 82-74, 82-99
Dartmouth Board of School Commissioners ... 79-37
Dartmouth City ... 79-12, 80-118, 80-130, 81-06, 81-08, 81-47, 82-08, 83-39, 83-89
Dartmouth City Board of School Commissioners ... 78-25
Dartmouth District School ... 83-112
Dartmouth Firefighters Association, Local 1398 ... 79-12
Dartmouth Firefighters Association, Local 1398, I.A.F.F. ... 81-47
Dartmouth General Hospital ... 80-05, 80-123, 81-21, 81-55, 82-30
Dartmouth General Hospital & Community Health Centre ... 81-21, 81-81, 82-27, 83-58, 83-65, 83-74, 83-78, 83-97
Dartmouth Marine Slips ... 81-16
Dartmouth Police Association, Local 101, (P.A.N.S.) ... 80-130
Dawso-Electric Limited ... 79-35, 80-63, 80-74, 81-40, 81-64, 81-96, 81-115, 82-48, 82-49
Deono Theatre Limited ... 80-60
Deuteruim of Canada Limited ... 81-107
Digby General Hospital ... 79-44, 80-05
Digby Regional High School Board ... 80-158
Division 508 of the Amalgamated Transit Union ... 79-29
Dominion Stores Limited ... 82-112
Dominion Textile Inc. ... 82-114
Domtar Chemicals Inc. ... 80-46
Dover Corporation (Canada) Limited ... 80-100
Dover Turnbull Corporation Canada Limited ... 80-32
E and R Construction Co. Limited ... 81-63
Easco Electric Limited ... 81-38
East Cumberland Lodge ... 82-32
Eastern Drug Services ... 82-33, 82-42
Eastern Provincial Airways Limited ... 82-76, 82-104, 83-02
Elcon Petroleum Maintenance Limited ... 82-16
Energy and Chemical Workers' Union, Local 44 ... 82-78
Energy and Chemical Workers' Union, Local 823 ... 80-115, 81-56, 81-101, 82-09, 82-10
Energy and Chemical Workers' Union, Local 832, Port Hawkesbury ... 82-83
Enheat Limited ... 80-27, 80-59, 80-156, 81-35, 81-36, 82-14, 83-76
Enheat Limited, Plant No. 4, Aircraft Division, Amherst ... 80-23, 80-30
F. A. Tucker (Atlantic) Limited ... 80-35
Fairview Electric Limited ... 80-48, 80-51, 80-101

Fairview Electric (1980) Limited ... 81-04
Fairview Villa Nursing Home ... 80-97
Ferguson Industries Limited ... 78-36, 81-17, 82-35
Franki Canada Limited ... 81-129
G. K. S. Masonry Limited ... 80-62
General Equipment Limited ... 82-45
General Home Systems Limited ... 80-31
General Workers of Sydney, C.L.C., Local 1509 ... 81-79
George L. Mitchell Contractors Limited ... 82-02
Glace Bay Community Hospital ... 82-95, 83-20
Glace Bay Heavy Water Plant ... 80-135
Glen Haven Manor Corporation ... 80-169
Glenview Health Care Services Limited ... 83-108
Governors of Acadia University ... 78-32, 80-151, 81-01, 83-80
Governors of Dalhousie College and University ... 79-05, 79-06, 79-50, 80-14, 80-61, 80-160, 80-176, 81-10, 81-24, 81-43, 81-51, 83-55, 83-81, 83-82
Governors of Dalhousie University ... 79-60
M. W. Graves & Co. ... 83-105
Guysborough Municipal School Board ... 82-21
H. B. M. Mechanics Limited ... 83-11
H. M. W. Industries ... 83-07
Halifax City ... 78-06, 78-13, 78-17, 78-18, 78-42, 79-04, 79-19, 80-56, 80-70, 80-75, 80-120, 80-144, 81-09, 81-11, 81-15, 81-37, 81-52, 81-54, 81-70, 81-111, 82-15, 82-58, 82-75, 82-81, 83-102
Halifax Civic Employees Union, Local 143, C.U.P.E. ... 83-102
Halifax Civic Workers' Union, Local 108 ... 78-13, 78-42, 79-19, 80-34, 80-56, 80-75, 80-120, 80-144, 80-150, 81-09, 81-52, 81-54, 81-70, 81-111, 82-58, 82-75
Halifax County - Bedford District School Board ... 82-82, 83-53
Halifax - Dartmouth Regional Authority Employees' Association ... 79-15
Halifax Forum Commission ... 80-34, 80-150
Halifax Industries Limited ... 80-58, 80-80, 81-16, 81-94, 81-95, 82-43, 82-80, 83-87
Halifax Industries Limited, Dartmouth Marine Slips ... 82-59, 82-60
Halifax Infirmary ... 79-52, 80-44, 81-05, 81-61, 81-66, 81-108, 82-25, 82-52, 82-56, 83-09
Halifax Longshoremans' Association, I.L.A., Local 268 ... 81-34
Halifax Longshoremans' Association, I.L.A., Local 269 ... 80-81
Halifax Municipal School Board ... 81-16
Halifax Patrolmens' Association, Local 110 ... 78-18
Halifax Police Patrolmens' Association, Local 110, P.A.N.S. ... 81-11
Halifax Transit Corporation ... 79-29, 80-41, 81-53
Hawker Industries Limited ... 80-11
Hawker Siddeley Canada Inc. ... 81-60, 81-106, 82-13, 82-61, 82-85, 82-98, 83-34, 83-62, 83-67, 83-106
Hawker Siddeley Industries Limited ... 79-58
Hazel Hill Rest Home Corporation ... 80-91
Heckett-Division of Harsco Corp. ... 81-79
A. R. Hemming Systems Limited ... 81-28
Hermes Electronics Limited ... 79-51, 81-98, 81-116, 83-04
Hillcrest Manor Nursing Home Limited ... 83-109
Hotel and Restaurant Employees and Bartenders International Union, Local 662 ... 79-45, 82-01

Hotel and Restaurant Employees and Bartenders International Union, Local 772 ... 80-84
Hotel and Restaurant Employees and Bartenders Union ... 80-116
Hotel and Restaurant Employees and Bartenders Union, Local 662 ... 80-170, 80-171, 81-22, 81-30, 81-33, 83-10
Hotel and Restaurant Employees and Bartenders Union, Local 772 ... 80-89
Hotel, Motel, Restaurant, Bartenders, Construction Camps and Club Service Employees, Local 622 ... 78-23, 78-30
Hotel Nova Scotian ... 81-30, 81-33
Hotel, Restaurant and Bartenders Union, Local 622 ... 79-36
Huyck Canada Limited ... 82-93, 83-32
Inducon Construction (Northern) Incorporation ... 80-21
Industrial Electrics Limited ... 83-45
Industrial Union of Marine and Shipbuilding Workers ... 80-58, 82-80
Industrial Union of Marine and Shipbuilding Workers, Local 1 ... 81-95
Industrial Union of Marine and Shipbuilding Workers, Local 13 ... 80-58, 81-16, 81-94, 82-59, 82-60
Industrial Union of Marine and Shipbuilding Workers of Canada ... 82-80
Industrial Union of Marine and Shipbuilding Workers of Canada, Local 15 ... 80-52, 83-90
Industrial Union of Marine and Shipbuilding Workers of Canada, Local 24 ... 81-45
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ... 80-60
International Association of Carpenters and Joiners, Local 1588 ... 82-55
International Association of Firefighters, Local 268 ... 78-06, 79-04, 80-70, 81-15, 81-37, 82-15, 82-81
International Association of Firefighters, Local 628 ... 78-06
International Association of Firefighters, Local 1398 ... 79-12, 82-08
International Brotherhood of Carpenters and Joiners, Local 83 and 1392 ... 81-63
International Brotherhood of Electrical Workers, Local 625 ... 81-96, 83-27, 83-45
International Brotherhood of Electrical Workers, Local 625 (T. D. Chaisson Electric) ... 80-24
International Brotherhood of Electrical Workers, Local 625 (B. G. Checo International Limited) ... 81-96
International Brotherhood of Electrical Workers, Local 625 (Dawco Electric) ... 79-35, 80-63, 80-74, 81-40, 81-64, 81-96, 81-115, 82-48, 82-49
International Brotherhood of Electrical Workers, Local 625 (Easco Electric) ... 81-38
International Brotherhood of Electrical Workers, Local 625 (Fairview Electric) ... 80-48, 80-51, 80-101, 81-04
International Brotherhood of Electrical Workers, Local 625 (L. Lewis Electric) ... 80-22
International Brotherhood of Electrical Workers, Local 625 (Mersey Electrical & Mechanical Contracting Limited) ... 82-116
International Brotherhood of Electrical Workers, Local 625 (George L. Mitchell Contracting Limited) ... 82-02
International Brotherhood of Electrical Workers, Local 625 (N. S. Armature Works Limited) ... 82-40

International Brotherhood of Electrical Workers, Local 625 (O'Malley Electric Limited) ... 82-92, 83-29
International Brotherhood of Electrical Workers, Local 625 (R. G. Souther Electric Limited) ... 81-117
International Brotherhood of Electrical Workers, Local 625 (Western Electric) ... 83-11, 83-25
International Brotherhood of Electrical Workers, Local 1030 ... 79-02, 80-40, 81-73, 81-109, 82-97, 82-107, 83-03, 83-14, 83-64, 83-92
International Brotherhood of Electrical Workers, Local 1651 ... 79-51, 81-98, 81-116, 83-04
International Brotherhood of Electrical Workers, Local 1852 ... 80-134
International Brotherhood of Electrical Workers, Local 1928 ... 78-40, 79-20, 79-31, 79-38, 79-40, 80-16, 80-35, 80-54, 80-67, 80-79, 80-82, 80-93, 80-143, 80-145, 80-167, 81-58, 81-84, 81-104
International Brotherhood of Railway, Transport and General Workers, Local 606 ... 79-52
International Longshoremen's Association, Local 1039 (Shipliners, of the port of St. John, N.B.) ... 82-38
International Longshoremen's Association, Local 1825 ... 82-07
International Moulders and Allied Workers' Union, Local 332 ... 80-64, 83-103
International Union of Bricklayers and Allied Craftsmen ... 80-09, 80-42, 80-50, 80-62, 80-121, 81-113, 82-06, 82-54
International Union of Elevator Constructors, Local 125 ... 80-32, 80-100, 82-45
International Union of Marine & Shipbuilding Workers, Local 1 ... 83-87
International Union of Marine & Shipbuilding Workers, Local 13 ... 82-43
International Union of Operating Engineers ... 83-75
International Union of Operating Engineers, Local 721 ... 78-04, 78-47, 80-85, 80-173, 81-129, 82-20
International Union of Operating Engineers, Local 721B ... 81-130
International Union of Operating Engineers, Local 968 ... 78-31, 79-06, 79-43, 80-78, 80-88, 82-03
International Union of Operating Engineers, Local 968 and 968B ... 78-31
International Union of Operating Engineers, Local 968B ... 78-31, 78-32, 80-151, 83-80
International Union, United Automobile, Aerospace and Agricultural Implement Workers' of America, (U.A.W.), Local 720 ... 80-36, 80-95, 81-14, 82-31, 83-37, 83-96
Inter Supply Limited ... 83-19
Inverness County Municipal Corp. ... 83-91
Inverness County Municipal School Board ... 80-132
Island Telephone Co. ... 83-03
I.W.K. Technical Employees Association ... 83-93
Izaak Walton Killam Hospital for Children ... 80-137, 83-93
J. D. MacLean ... 83-50
J. W. Rudderham Limited ... 80-134
John D. Coleman Masonry Limited ... 80-121
Joint Expenditure Board for the County of Cape Breton ... 78-24, 79-28
Joneljim Concrete Construction Limited ... 81-75, 82-39, 83-12, 83-44
Kentville General Workers' Union, Local 301 ... 81-46
Kentville Hospital Association ... 79-21, 81-02
Kentville Hospital Employees' Association, Local 3 ... 79-21
Kentville Police Association ... 80-152, 82-22, 83-43

Kentville Town ... 80-152, 82-22, 83-43
Kenvic Transport Limited ... 82-89
Kings County ... 78-01, 78-02
Komac Excavating Company ... 79-08
L. Lewis Electric Limited ... 80-22
Labourers' International Union, Local 615 ... 80-122, 81-90
Labourers' International Union, Local 1115 ... 79-08, 79-09, 79-25, 79-34, 79-56, 80-04, 80-21, 81-48, 81-75, 83-12, 83-50
Letter Carrier's Union of Canada ... 83-98
Lord Nelson Hotel Limited ... 79-36, 80-116, 80-170, 80-171, 82-01, 83-10
Lunenburg Municipal School Board ... 80-125
Lunenburg Police Association, Police Association of Nova Scotia, Local 207 ... 79-03, 80-57
Lunenburg Town ... 79-03, 80-57
M. Sullivan and Sons Limited ... 79-56
MacDougall Construction Limited ... 82-108
MacIntyre Chevrolet, Oldsmobile Limited ... 83-40
J. D. MacLean ... 83-50
Marine Office and Technical Employees' Union ... 80-80
Maritime Beverages Limited ... 78-19, 78-26, 78-37, 80-96, 81-86, 81-87, 81-92, 81-110, 82-67, 83-22, 83-63, 83-95
Maritime Co-Operative Services ... 78-27
Maritime Employers' Association ... 80-81, 81-34, 82-07, 82-38
Maritime Steel and Foundries Limited ... 79-33, 79-59, 80-64, 83-103
Maritime Telegraph and Telephone Company Limited ... 79-02, 79-17, 80-40, 81-73, 81-109, 82-97, 82-107, 83-14, 83-64, 83-92
Marks and Spencer Canada Incorporated (Peoples Division) ... 80-140
Masonite Canada Inc. ... 82-101, 82-102
G. K. S. Masonry Limited ... 80-62
H. B. M. Mechancis Limited ... 83-11
Mersey Electrical and Mechanical Contracting Limited ... 82-116
Metropolitan Authority Employees' Association ... 80-08, 81-39
Metropolitan Authority of Halifax ... 80-01
Metropolitan Authority of Halifax, Dartmouth and the County of Halifax ... 79-15, 80-08, 81-39, 81-41, 83-26
Metropolitan Stores (Glace Bay) ... 82-91
Metropolitan Transit Commission ... 82-63, 82-109
Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax ... 83-70
Millwrights & Machine Erectors, Local 1178 ... 83-07
Minas Basin Pulp and Paper Co. Limited ... 82-12
George L. Mitchell Contractors Limited ... 82-02
Modern Building Cleaning ... 80-141
Moosehead Breweries Limited ... 80-15, 81-69
Municipal Ready Mix Limited ... 79-25
Municipal School Board for the County of Inverness ... 80-132
Municipal School Board for the Municipality of the District of Lunenburg ... 80-125
Municipal School Board, Municipality of the County of Halifax ... 81-18

Municipal Spraying and Contracting Limited ... 80-173
Municipal Spraying and Contracting Limited and Rocky Lake Quarry Division of Municipality of the County of Kings ... 78-01, 78-02
Municipality of the County of Cumberland ... 82-37
Municipality of the County of Halifax Municipal School Board ... 81-18
Municipality of the County of Kings Correction Officers Association, Local 125 of the Police Association of Nova Scotia ... 78-01, 78-02
Municipality of the District of Lunenburg ... 83-72
Murphy and Wharton (1978) Limited ... 82-66
M. W. Graves & Co. ... 83-105
NABET ... 82-79
National Harbours Board ... 81-20
National Sea Products Limited ... 78-14, 78-28, 79-11, 80-107, 80-133
New Brunswick Broadcasting Co. Limited ... 82-79
New Glasgow Police Association ... 83-01, 83-69
New Glasgow Town ... 83-01, 83-69
New Waterford Town ... 81-78, 81-91
New Waterford Town, Board of Police Commissioners ... 82-90
New Waterford Town, Board of School Commissioners ... 81-83
North Sydney Marine Railway Co. ... 83-35
North Sydney Seafoods Limited ... 80-73
Northside General Hospital ... 78-43, 82-64, 83-21
Northside-Victoria Amalgamated Board of School Commissioners ... 81-89
Northwest Construction Limited ... 78-47
Nova Scotia Armature Works Limited ... 82-40
Nova Scotia Association of Health Organizations (Dartmouth General Hospital) ... 80-123
Nova Scotia Building Supplies Limited ... 80-55
Nova Scotia Civil Service Commission ... 78-29, 79-18, 79-27, 80-83, 80-92, 80-106, 80-142, 80-146, 80-147, 80-153, 80-162, 80-163, 80-164, 81-80, 81-119, 81-120, 81-121, 81-122, 81-123, 81-124, 81-125, 81-126, 81-127, 81-128, 82-04, 82-26, 82-44, 82-51, 82-53, 82-68, 82-96, 82-111, 83-51, 83-56, 83-115, 83-116
Nova Scotia Civil Service (Housing Commission) ... 79-27
Nova Scotia Forest Industries ... 80-177, 82-24
Nova Scotia Government ... 78-20, 80-126
Nova Scotia Government Employees' Association, Branch 18 ... 78-46, 79-46
Nova Scotia Government Employees' Union ... 78-20, 78-29, 79-18, 79-27, 80-69, 80-83, 80-92, 80-105, 80-106, 80-126, 80-136, 80-142, 80-146, 80-147, 80-153, 80-162, 80-163, 80-164, 81-02, 81-80, 81-119, 81-120, 81-121, 81-122, 81-123, 81-124, 81-125, 81-126, 81-127, 81-128, 82-04, 82-26, 82-36, 82-44, 82-51, 82-53, 82-68, 82-96, 82-105, 82-111, 83-51, 83-56, 83-115, 83-116
Nova Scotia Housing Commission ... 79-27
Nova Scotia Liquor Commission ... 78-38, 80-13, 80-20, 81-76, 81-102, 83-84
Nova Scotia Liquor Commission Employees, Local 470 ... 78-38, 80-20, 81-76, 81-102, 83-84
Nova Scotia Nurses' Union ... 81-12, 81-88, 81-103, 81-108, 81-114, 82-25, 82-52, 82-64, 82-88, 83-74, 83-78
Nova Scotia Nurses' Union, Cape Breton Hospital ... 80-138
Nova Scotia Nurses' Union, Colchester Local ... 83-111
Nova Scotia Nurses' Union, Glace Bay Community Hospital Local ... 82-95

Nova Scotia Nurses' Union, Halifax Infirmary Local ... 81-61, 81-108, 82-25, 82-52, 82-56
Nova Scotia Nurses' Union, Kentville Hospital Local ... 83-41
Nova Scotia Nurses' Union, Seaview Manor Home for Special Care Local ... 83-66
Nova Scotia Nurses' Union, Twin Oaks Memorial Hospital Local ... 82-88, 83-38
Nova Scotia Power Corporation ... 79-20, 79-38, 79-40, 80-16, 80-54, 80-67, 80-79, 80-82, 80-93, 80-143, 80-145, 80-167, 81-58, 81-84, 81-104, 82-77, 83-06
Nova Scotia Supreme Court, Appeal Division ... 81-107
Nova Scotia Supreme Court, Trial Division ... 81-108, 82-51, 82-52
Nova Scotia Teachers' Union ... 78-25, 81-18, 81-97, 82-82, 83-53, 83-100
Nova Scotia Teachers' Union, New Waterford Local ... 81-83
Nova Scotia Textiles Limited ... 79-10, 80-06, 81-68
Nova Scotia Union of Public Employees ... 80-118, 81-06, 81-08
Nova Scotia Union of Public Employees, Unit No. 1 ... 83-39, 83-89
Nova Scotia Union of Public Employees, Unit No. 2 ... 79-37, 83-112
Nurses' Union of the Cape Breton Hospital ... 80-138
Oil, Chemical and Atomic Workers, Local 9-785 ... 78-35, 80-103
Oil, Chemical and Atomic Workers, Local 9-823 ... 78-05, 78-34, 80-109, 80-129, 80-175
Oil, Chemical and Atomic Workers', Local 9-856 ... 80-154
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-824 ... 80-46
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-832 ... 78-34
Oil, Chemical and Atomic Workers', Salt Workers, Local 9-875 ... 78-35
Oland Breweries Limited ... 79-42
O'Malley Electric Limited ... 82-92, 83-29
O'Toole's Transfer Limited ... 79-24, 79-39, 81-27
Painters and Allied Trades, Local 1945 ... 82-39
Pelton and Company Limited ... 80-119
Pictou County Municipal School Board ... 78-03, 82-28
Pilkington Glass Limited ... 82-46
Pilkington Glass Limited (Halifax Glass Center) ... 82-34
Point Pleasant Park Directors ... 80-34, 80-150
Police Association of Nova Scotia ... 81-20
Police Association of Nova Scotia, Local 101 Dartmouth Police Association ... 80-130
Police Association of Nova Scotia, Local 103 - New Glasgow Police Association ... 83-01
Police Association of Nova Scotia, Local 107 - Kentville Police Association ... 83-43
Police Association of Nova Scotia, Local 110 Halifax Police Patrolmens' Association ... 78-18, 81-11
Police Association of Nova Scotia, Local 125 - Municipality of the County of Kings, Correction Officers Association ... 78-01, 78-02
Police Association of Nova Scotia, Local 207 - Lunenburg Police Association ... 79-03, 80-57
Post Publishing Company Limited ... 80-113
Producers Milk Products Limited ... 80-112, 80-161, 81-71, 82-19
Province of Nova Scotia by Civil Service Commission ... 78-29
Public Service Alliance of Canada ... 82-70, 82-100, 83-59
Public Service Commission of Halifax ... 82-18, 82-113

Queen's General Hospital ... 78-21, 79-23, 80-90
Queen's General Hospital Association, Inc. ... 81-19
R. G. Souther Electric Limited ... 81-177
Rahey's Supermarket ... 82-65, 83-104
Red and White Store of Port Hawkesbury ... 80-53
Reeves Modular Homes Limited ... 80-76, 80-157, 82-55
Retail Clerks' Union and the Canadian Food and Allied Worker's merged in 1980, to form the United Food and Commerical Workers' Union
Retail Clerks' Union, Local 1973 ... 80-65, 80-87
Retail, Wholesale and Department Store Union, Local 596 ... 79-14, 79-16, 80-140, 81-25, 81-99, 82-65, 82-91, 83-71, 83-104
Retail, Wholesale and Department Store Union, Local 1015 ... 79-13, 80-96, 81-85, 82-62, 82-67, 83-49, 83-95
Richmond District School Board ... 82-71
Richmond Fisheries Incorporated ... 79-61, 80-155, 81-07
Richmond Trawlers Limited ... 78-07
Rite-Way Builders ... 80-42
Riverport Seafood Limited ... 80-25
Robb Engineering ... 81-32, 82-57 83-48
Robb Engineering, Division of Dominion Bridge Company Limited ... 79-01, 80-03, 80-19
Rocky Lake Quarry Division ... 80-173
J. W. Rudderham Limited ... 80-134
Saga Canadian Management Services Limited ... 80-177
Saint Mary's University ... 79-32, 79-53
Saint Mary's University Faculty Union ... 79-53
Saint Michael's Shops of Canada ... 79-14, 79-16
Saint Rita Hospital ... 81-88
Scotian Crewing and Supply Services Limited ... 82-50
Scotian Gold Co-Operative Limited ... 78-08
Scott Maritimes Limited ... 80-72, 82-23, 82-29, 83-23
Scott Maritimes Pulp Limited ... 78-09, 78-10, 78-44
Seaboard G.M. Diesel Limited ... 81-130, 83-75
Seaport Contractors Limited ... 81-90
Seaview Manor Home for Special Care ... 83-66
Sheet Metal Workers' International Association, Local 409 ... 79-41
Shelburne District Municipal School Board ... 80-114, 80-127, 80-128, 83-68, 83-77
Sivaco Maritimes Limited ... 80-17, 80-99, 80-139
Sobey's Stores Limited ... 80-65, 80-87, 82-47, 82-73, 83-85
Sobey's Stores Limited, Port Hawkesbury ... 82-72
R. G. Souther Electric Limited ... 81-117
Springhill Police Association ... 83-73
Springhill Town ... 83-73
Stellarton Police Association, Local 305 ... 83-46
Stellarton Town ... 83-46
Stephens Building Supplies (1979) Limited ... 81-99, 83-71
Strait-Richmond Hospital ... 83-61
M. Sullivan and Sons Limited ... 79-56
Sunset Nursing Home ... 78-22
Sunset Residential Centre ... 83-79
Supreme Court of Nova Scotia, Appeal Division ... 81-107

Supreme Court of Nova Scotia, Trial Division ... 81-108, 82-51, 82-52
Sydney and District General Workers' Union, Local 1509 ... 78-27
Sydney City ... 78-15, 78-45, 79-54, 80-45, 80-47, 80-66, 80-94, 81-31, 81-44, 81-65, 81-74, 82-41
Sydney City Board of Police Commissioners ... 83-86
Sydney Co-Op Society Limited ... 79-26
Sydney Engineering and Dry Dock Company Limited ... 80-52
Sydney Masonry Co. Limited ... 79-34
Sydney Steel Corporation ... 80-77, 80-172, 81-59, 83-47, 83-57
Sydney Typographical Union, No. 460 ... 80-113
T. D. Chaisson Electric Limited ... 80-24
T. P. Calkin ... 81-46
Teamsters, Chauffeurs, Warehousemen, Local 92 ... 82-19
Teamsters, Chauffeurs, Warehousemen and Helpers, Local 927 ... 78-16, 78-19, 78-26, 78-37, 78-39, 79-24, 79-39, 80-26, 80-28, 80-33, 80-71, 80-110, 80-112, 80-161, 81-67, 81-71, 81-72, 81-112
Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927 ... 81-27, 81-49, 81-86, 81-87, 81-92, 82-34, 82-46, 82-103, 82-106, 83-19, 83-22, 83-63
Teamsters Union, Local 927 ... 80-166
Telephone Operators' Union ... 79-17
Telephone Traffic Operators, Local Union 1030 ... 79-02
Texaco Canada ... 83-60
Town of Antigonish ... 78-40, 79-31
Town of Kentville ... 80-152, 82-22, 83-43
Town of Lunenburg ... 79-03, 80-57
Town of New Glasgow ... 83-01, 83-69
Town of New Waterford ... 81-78, 81-91
Town of New Waterford, Board of Police Commissioners ... 82-90
Town of New Waterford, Board of School Commissioners ... 81-83
Town of Springhill ... 83-73
Town of Stellarton ... 83-46
Town of Trenton ... 83-36
Town of Truro ... 83-94
Town of Westville ... 78-12
Town of Yarmouth ... 80-38
Trenton Police Association ... 83-36
Trenton Town ... 83-36
Trenton Works Division, Hawker Industries Limited ... 80-104, 80-159
Truro Police Association ... 83-94
Truro Town ... 83-94
F. A. Tucker (Atlantic) Limited ... 80-35
Twin Cities Co-Operative Dairy Limited ... 78-16, 78-39, 80-26, 80-28, 80-33, 80-110, 81-67, 81-72, 81-112, 82-103, 82-106
Twin Cities Masonry (1972) Limited ... 80-09
Twin Oaks Memorial Hospital ... 82-88, 83-38
United Association of Journeymen and Apprentices of the Plumbing, Steamfitting & Pipefitting Industry, Local 56 ... 81-26, 82-66
United Association of Journeymen and Apprentices of the Plumbing, Steamfitting & Pipefitting Industry, Local 682 ... 83-54
United Automobile Workers of America, Local 720 ... 80-36, 80-95, 81-14, 82-31, 83-37, 83-96

United Brotherhood of Carpenters and Joiners of America ... 80-31, 80-49
United Brotherhood of Carpenters and Joiners of America, Local 83 ... 80-119, 81-42, 83-13
United Brotherhood of Carpenters and Joiners of America, Local 1392 ... 82-108
United Brotherhood of Carpenters and Joiners of America, Local 1588 ... 83-44, 83-110
United Brotherhood of Carpenters and Joiners of America, Local 2165 ... 81-28
United Brotherhood of Carpenters and Joiners of America, Local 2179 ... 80-76, 80-157
United Brotherhood of Carpenters and Joiners of America, Local 2215 ... 80-124, 80-174
United Brotherhood of Carpenters and Joiners of America, Local 2284 ... 83-83
United Brotherhood of Carpenters and Joiners of America, Local 2325 ... 82-84
United Cement, Lime & Gypsum Workers International Union ... 83-101
United Food and Commercial Worker's, Local 309 ... 81-07
United Food and Commercial Worker's, Local 642 ... 81-13
United Food and Commercial Worker's, Local 910 ... 82-47, 82-115, 83-15, 83-16, 83-17, 83-18
United Food and Commercial Worker's, Local P-1157 ... 81-57
United Food and Commercial Worker's, Local 1973 ... 82-72, 82-73, 82-112, 83-85
United Maritime Fishermen's Co-Operative Limited ... 80-43
United Steelworkers of America ... 79-59, 80-23, 83-67
United Steelworkers of America, Local 1064 ... 80-172, 83-57
United Steelworkers of America, Local 1231 ... 79-58, 80-11, 80-18, 80-104, 80-159, 81-60, 81-106, 82-13, 82-85, 82-98, 83-34
United Steelworkers of America, Local 3172 ... 79-33
United Steelworkers of America, Local 4122 ... 79-01, 80-03, 80-19, 81-32, 82-57, 83-48
United Steelworkers of America, Local 4253 ... 82-61, 83-62, 83-106
United Steelworkers of America, Local 4700 ... 82-35
United Steelworkers of America, Local 4702 ... 78-36, 81-17
United Steelworkers of America, Local 4883 ... 80-30, 80-59, 81-35, 82-14, 83-76
United Steelworkers of America, Local 6516 ... 80-77, 81-59
United Steelworkers of America, Local 6537 ... 83-47
United Steelworkers of America, Local 6874 ... 80-27, 80-156
United Steelworkers of America, Local 8202 ... 81-36
United Steelworkers of America, Local 8679 ... 80-17, 80-99, 80-139
United Textile Workers of America, Local 152 ... 82-114
United Textile Workers of America, Local 159 ... 79-10, 80-06, 81-68
United Textile Workers of America, Local 486 ... 82-93, 83-32
V. S. Services Limited ... 80-131, 83-52
Valley Health Services Association ... 83-41
Van Rez Products Limited ... 83-83
Volvo Canada Limited ... 80-36, 80-95, 81-14, 82-31, 83-37, 83-96
W. Eric Whebby Limited ... 83-13
W. M. Walker Plumbing & Heating Limited ... 81-26
Waterford Co-Operative Supply Depot Limited ... 78-11, 79-55, 80-165
Western Electric ... 83-11, 83-25
Westville Police Association, Local 206 ... 78-12
Westville Town ... 78-12

W. Eric Whebby Limited ... 83-13
Wilson Family Restaurant Limited ... 80-84
W. M. Walker Plumbing & Heating Limited ... 81-26
Yarmouth Regional Hospital ... 80-10, 81-03
Yarmouth Town ... 80-38
Zutphen Brothers' Construction Limited ... 83-110

PART 4

BROWN & BEATTY TOPICAL CODE INDEX, 1978 - 1983

BROWN & BEATTY TOPICAL CODE INDEX

1 - ARBITRATION OF GRIEVANCES IN CONTEXT

1:0000 Introduction ... 78-25, 80-146
1:1000 The Legislative Framework ... 80-48, 80-50, 80-51, 80-119, 81-42, 81-63, 82-16
1:2000 The Nature of the Arbitral Process ... 79-23, 82-25
1:3000 The Development of a Common Law of Arbitration ... 80-48, 80-50, 80-51, 80-119, 81-19, 81-38, 81-42, 81-63, 82-16
1:4000 Concurrent Jurisdiction with Courts and Administrative Agencies ... 80-85
1:4100 Administrative Agencies ... 80-85
1:5000 Judicial Review of Grievance Arbitration ... 81-51, 82-51, 82-52
1:5100 Judicial Review Procedures ... 80-29, 80-77, 80-86, 80-146
1:5200 The Arbitration Process ... 78-15
1:5210 The Requirement of Impartiality ... 78-15, 79-32, 79-55, 81-23, 81-81, 81-82, 81-111
1:5300 Jurisdictional Error ... 80-29, 82-51
1:5400 Error of Law on the Face of the Award ... 80-86, 81-51, 81-107, 81-108
1:5410 Exception: Consensual Arbitration ... 80-29, 81-51
1:5600 Functus Officio ... 82-79, 83-89

2 - JURISDICTION OF THE ARBITRATOR

2:0000 Introduction ... 79-12, 82-06
2:1000 Primary Sources of Jurisdiction ... 78-03
2:1100 The Statutory Requirement ... 79-16, 79-22, 79-24, 79-28, 79-29, 80-147, 81-27, 81-37, 82-70, 82-95, 83-113
2:1200 The Collective Agreement ... 78-26, 78-29, 79-08, 79-12, 79-22, 79-53, 79-58, 80-24, 80-32, 80-70, 80-128, 80-164, 81-123, 82-08, 82-55, 82-92, 83-80, 83-85, 83-86
2:1210 Individual Contracts of Employment ... 78-26, 78-29, 79-08, 79-53, 79-58, 80-24, 80-164, 82-69, 82-70, 83-24, 83-64
2:1300 The Submission of Arbitration ... 79-12, 79-22, 82-48, 82-51, 82-79, 83-14
2:1400 Remedial Authority of the Arbitrator ... 80-116, 80-140, 82-22, 82-79, 83-51, 83-61, 83-89
2:1410 Damages ... 80-84, 80-116, 81-04, 82-22, 82-50, 82-79, 83-86
2:1412 Duty to Mitigate ... 80-38, 82-22, 83-48
2:1423 Missed Overtime Opportunities ... 81-47, 82-79, 82-85
2:1424 Improper Work Assignments ... 81-48, 82-108
2:1425 Improper Lay-offs ... 83-28
2:1426 Union Security Claims ... 82-45, 82-108
2:1430 Ordering Costs ... 80-09
2:1440 Rectification ... 79-22
2:1450 Compliance Orders ... 83-13
2:1470 Reinstatement and Substitution of Penalty ... 79-59, 82-96, 82-97, 82-99, 83-23, 83-108
2:1480 Restitution and Set-off ... 79-59
2:2100 Statutes ... 82-55, 83-113

2:2200 Promissory Estoppel ... 80-24, 80-59, 80-61, 81-65, 81-71, 82-58, 82-92, 83-01, 83-16, 83-19, 83-24, 83-54, 83-88
2:2210 The Doctrine ... 80-59, 80-61, 80-74, 82-95, 83-18, 83-24, 83-81
2:2220 Applications of Promissory Estoppel ... 80-24, 80-59, 80-61, 81-97, 82-98, 83-13, 83-39, 83-81
2:3000 Limits to the Arbitration of Grievances: Arbitrability ... 78-17, 78-25, 78-30, 78-32, 78-40, 78-45, 79-03, 79-12, 79-48, 79-50, 79-51, 79-54, 79-55, 81-80
2:3100 Collective Agreement Limitations ... 78-45, 79-03, 79-12, 79-48, 79-51, 79-55, 82-42
2:3110 Parties ... 81-41, 82-04, 82-109
2:3120 Compliance with the Grievance Procedure ... 78-30, 78-32, 78-45, 79-12, 79-35, 79-48, 79-51, 80-57, 81-14, 82-85, 83-103
2:3122 The Form of the Grievance ... 78-32, 80-62, 80-82, 80-105, 81-21, 81-27, 81-49, 81-126, 83-14, 83-19, 83-42, 83-105
2:3124 Policy Grievances ... 78-32, 79-25, 80-23, 81-14, 81-21, 82-47, 82-88, 83-14, 83-28, 83-42, 83-67, 83-83, 83-111
2:3126 Group Grievances ... 78-32, 82-71, 83-74, 83-105
2:3128 Time Limits ... 78-30, 78-32, 78-40, 79-34, 79-51, 79-55, 79-60, 80-19, 80-29, 80-52, 80-86, 80-94, 80-103, 80-124, 80-149, 81-12, 82-47, 82-71, 82-77, 82-88, 82-109, 83-13, 83-28, 83-31, 83-48, 83-81, 83-83, 83-109
2:3130 Waiver of Procedural Irregularities ... 79-34, 79-51, 79-55, 79-60, 80-19, 80-26, 80-103, 81-27, 82-29, 82-57, 82-71, 83-07, 83-19, 83-32
2:3140 Relief Against Non-Compliance with the Grievance Procedure ... 78-45, 79-43, 79-57, 80-26, 80-103, 80-149, 80-168
2:3200 Limitations Apart from the Collective Agreement ... 79-50, 79-54, 81-19, 81-27, 82-57
2:3210 Delay ... 80-124, 83-28, 83-31, 83-48, 83-93, 83-109
2:3220 Prior Award ... 79-31, 79-32, 81-31, 81-38, 82-58, 82-85, 82-92, 83-55
2:3230 Abandonment, Settlement and Withdrawal ... 78-17, 78-25, 79-21, 79-22, 79-31, 79-50, 79-54, 80-52, 83-17, 83-42, 83-51, 83-98
2:4000 Exhaustion of Jurisdiction ... 83-89

3 - THE ARBITRATION PROCESS

3:1100 Establishment of the Board of Arbitration ... 79-32, 79-55, 81-23
3:1200 Parties and Participants ... 83-18
3:1210 Notice of Parties Affected ... 80-19, 82-89
3:2000 The Hearing: Preliminary Matters ... 79-03, 79-05
3:2100 Preliminary Objections ... 79-03, 79-05, 79-31, 79-32, 79-57, 80-32, 80-78, 80-157, 81-123, 82-06, 82-08, 82-57, 82-58, 82-70, 82-71, 82-77, 82-85, 83-14, 83-15, 83-19, 83-31, 83-48, 83-51, 83-66, 83-109
3:2200 Change of Position ... 79-18, 81-103, 82-64, 82-70
3:2300 Adjournments ... 80-22, 82-39
3:2400 Onus or Burden of Proof ... 79-25, 79-40, 79-43, 82-56, 82-86, 83-04, 83-26, 83-50, 83-51, 83-55, 83-88, 83-104,
3:2410 Specific Applications of the Burden of Proof ... 79-19, 79-36, 81-30, 83-55
3:2413 Skill and Ability ... 80-14, 81-25, 81-127, 81-128
3:2415 Layoff and Recall ... 80-148, 83-88
3:2417 Distribution and Overtime ... 83-25
3:2500 The Standard of Proof ... 80-12, 80-16, 81-30

3:3000 The Adducing of Evidence ... 80-101
3:3100 Real and Documentary Evidence ... 83-03
3:3226 Re-Examination ... 80-101
3:4000 Admissibility of Evidence ... 82-87
3:4200 The Basic Principle: Relevance ... 80-176, 82-69
3:4400 Extrinsic Evidence ... 79-21, 79-44, 80-158, 82-71, 82-110, 83-27
3:4410 Procedure for Receiving ... 81-115
3:4420 Negotiating History ... 80-54, 82-71, 83-54, 83-111
3:4430 Past Practice ... 79-14, 80-04, 80-33, 80-58, 80-93, 80-96, 80-125, 81-71, 81-72, 81-73, 81-75, 81-77, 82-71, 82-83, 82-85, 83-16, 83-33, 83-59, 83-67, 83-87, 83-94, 83-95, 83-115
3:5100 Weighing the Evidence ... 80-18, 80-79

4 - THE COLLECTIVE AGREEMENT

4:0000 Introduction ... 82-39
4:1000 Form and Content of the Collective Agreement ... 78-04, 78-25, 79-07, 79-09, 79-31, 79-57, 80-157, 80-158
4:1100 Essentials of the Collective Agreement ... 81-71, 82-66
4:1200 Ancillary Documents ... 79-42, 80-30, 80-70, 80-164, 80-176, 82-45, 83-02
4:1300 Amendments ... 78-25, 83-45
4:1400 Pension, Insurance and Welfare Plans ... 78-04, 78-25, 79-09, 82-45, 82-54, 82-57, 82-111, 83-13, 83-27, 83-91
4:1500 Company Rules ...79-04, 79-07, 80-05, 80-130, 80-133, 80-138, 80-169, 81-98, 82-17, 82-21, 82-25, 82-44, 82-52, 82-102, 83-23, 83-75, 83-77, 83-102
4:1610 Retroactivity ... 80-13, 80-96, 80-122, 82-12, 82-70, 82-88, 83-45
4:1620 Term and Termination ... 78-25, 80-60, 80-173, 82-70, 82-112, 82-115, 83-50
4:2000 Interpretation of Collective Agreements ... 78-16, 78-39, 78-46, 79-14, 79-16, 79-17, 79-20, 79-35, 79-42, 79-44, 79-53, 80-04, 80-126, 80-128, 81-90, 81-93, 82-20, 82-105, 82-116, 83-110
4:2100 The Object of Construction: The Intention of the Parties ... 78-39, 78-46, 79-35, 79-42, 80-04, 80-15, 80-17, 80-35, 80-39, 80-41, 80-45, 80-54, 80-81, 80-126, 80-128, 80-134, 80-137, 80-139, 80-140, 80-150, 80-154, 80-156, 81-03, 81-11, 81-15, 81-17, 81-18, 81-19, 81-34, 81-40, 81-44, 81-76, 82-12, 82-13, 82-27, 82-29, 82-67, 82-76, 82-94, 82-110, 82-113, 83-03, 83-11, 83-12, 83-14, 83-16, 83-21, 83-27, 83-29, 83-33, 83-36, 83-39, 83-54, 83-59, 83-61, 83-63, 83-65, 83-68, 83-78, 83-86, 83-87, 83-92, 83-97, 83-110, 83-115
4:2210 Dictionaries ... 83-11, 83-44
4:2220 Prior Arbitration Awards and Judical Decisions ... 82-86, 83-21
4:2230 Statutes .. 78-16
4:2240 Prior Agreements ... 83-87
4:2250 Extrinsive Evidence ... 83-45
4:2300 The Collective Bargaining Context ... 79-25, 79-35, 79-42, 82-23, 82-38, 82-82, 82-93, 83-20, 83-61, 83-84, 83-116

5 - ORGANIZATION AND DIRECTION OF THE WORKPLACE

5:0000 Introduction ... 78-31, 79-25, 80-06, 80-46, 80-65, 80-83, 80-176, 81-13, 81-29, 82-38, 82-52, 82-102, 83-60
5:1000 Assignment of Work Outside the Bargaining Unit ... 78-03, 79-13
5:1100 Defining the Bargaining Unit ... 79-13, 82-56, 82-69
5:1120 Unit Definition in Terms of Employees ... 78-01, 79-13, 82-36
5:1122 Employee Defined ... 79-13, 80-127, 82-65
5:1124 Temporary, Casual and Part-Time Employees ... 79-13, 81-83, 82-36, 82-69, 83-46, 83-49, 83-50, 83-73, 83-91
5:1126 Foremen and Supervisors ... 80-21, 81-26, 83-66
5:1200 Bargaining Unit Work ... 79-13, 79-38, 80-09, 80-21, 80-47, 80-102, 80-113, 81-46, 81-48
5:1300 Assignment of Bargaining Unit Work to Non-Employees: Contracting Out ... 80-127, 81-31, 81-45, 82-58, 82-65, 82-83, 83-11, 83-45, 83-50
5:1400 Assignment of Bargaining Unit Work to Non-Unit Employees ... 79-06, 79-13, 80-47, 80-71, 80-76, 80-102, 80-121, 81-27, 81-33, 81-45, 81-46, 81-121, 82-18, 82-29, 82-35, 82-66, 82-84, 82-116, 83-04, 83-60
5:1500 Remedies for Improper Work Assignments ... 81-48, 82-35
5:2000 Distribution of Work Within the Bargaining Unit ... 78-35, 79-01, 79-06, 79-30, 80-75, 80-114, 81-66, 81-75, 82-117, 83-47, 83-67, 83-80
5:2200 Express Prohibitions in the Agreement ... 80-75, 82-41, 82-73, 83-01, 83-03, 83-12, 83-76, 83-111
5:2300 The Requirement of Bona Fides ... 79-06, 81-29, 82-29, 82-76, 82-82, 82-94, 83-47, 83-84, 83-88
5:2400 Compliance with Wage Structure ... 81-65, 82-41, 83-80
5:2410 Changes in Job Function ... 80-46, 82-31, 82-69, 83-49, 83-80
5:2420 Criteria: Equal Work or Equal Skill ... 81-66, 81-100, 81-104, 83-08, 83-38
5:2440 Revision of Classification and Rate ... 81-104, 82-41, 82-72, 82-117
5:2500 Procedural Requirements ... 79-01, 80-176, 82-81, 82-93, 83-36
5:2510 Vacancies ... 79-01, 80-19, 80-34, 80-98, 80-143, 80-176, 81-49, 81-88, 82-81, 83-20, 83-42, 83-49
5:2520 Job Posting 78-35, 79-01, 79-15, 80-143, 80-176, 81-29, 82-24, 83-20, 83-31, 83-100
5:3000 Scheduling Work ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-41, 79-49, 82-09
5:3100 Work Hours and Shifts ... 78-12, 78-31, 78-44, 79-49, 80-64, 81-77, 81-116, 82-18, 82-23, 82-60, 83-02, 83-16, 83-65, 83-111, 83-115
5:3200 Overtime ... 78-09, 78-12, 78-31, 78-34, 78-44, 79-49, 81-77, 81-129, 81-130
5:3210 Voluntary or Compulsory ... 78-34, 79-49, 80-151, 82-58, 83-107
5:3220 Proprietary Rights to Overtime Assignments ... 78-44, 79-40, 79-49, 80-95, 80-159, 80-177, 81-47, 81-112, 81-121, 82-18, 82-29, 82-83, 83-25, 83-99
5:3222 Persons Normally Performing the Work ... 79-49, 80-58, 81-17, 81-112, 82-80
5:3224 Allocation of Overtime Within the Group ... 78-09, 78-44, 79-49, 80-159, 82-58, 82-59, 82-101, 83-107
5:3230 Miscellaneous Restrictions ... 80-159
5:3240 Remedies ... 79-49, 81-47, 82-80

6 - SENIORITY

6:0000 Introduction ... 78-10, 79-17, 79-58, 81-76
6:1000 Acquisition and Termination ... 78-10, 78-30
6:1100 Generally ... 80-132, 83-48
6:1110 Non-Working Periods ... 83-64
6:1120 Non-Unit Employment ... 78-01, 83-58, 83-85, 83-114
6:1130 Super Seniority ... 80-74, 80-40
6:1200 Duration and Loss of Seniority ... 78-26, 78-30, 82-86, 83-71
6:2000 Applications of Seniority ... 78-10, 78-18, 78-19, 78-26, 78-27, 79-15, 79-17, 79-28, 79-29, 79-31, 79-37, 79-38, 79-51, 80-01, 80-69, 81-57, 81-80, 81-91, 81-123, 82-07, 82-90, 82-102, 82-103, 83-18
6:2100 Promotion, Demotion, Transfer ... 78-06, 78-18, 78-27, 79-15, 79-17, 79-20, 79-28, 79-29, 79-30, 79-37, 80-01, 80-10, 80-69, 80-98, 81-95, 82-68, 82-76, 82-93, 82-94, 83-03, 83-26, 83-57, 83-76, 83-84, 83-92, 83-100, 83-114
6:2200 Lay-off ... 78-10, 78-19, 78-26, 80-100, 82-07, 82-64, 82-102, 82-103, 82-115, 83-18, 83-29, 83-47, 83-49, 83-64, 83-83
6:2210 Reduction of Hours ... 79-41, 80-100
6:2220 Lay-off for Less than One Shift ... 80-100, 80-108, 81-46
6:2300 Promotion and Lay-off Procedures ... 78-06, 79-51, 81-123
6:2310 Job Posting ... 78-06, 81-76, 81-122, 81-125, 81-126, 81-127, 81-128, 82-51, 83-20
6:2320 Notice of Lay-off ... 79-19, 82-62, 83-28
6:2330 Bumping ... 78-26, 80-72, 80-145, 80-163, 80-167, 81-57, 82-13, 82-14, 82-102, 82-103, 82-115, 83-18, 83-47, 83-62, 83-101, 83-106
6:2340 Bumping Upwards ... 80-26, 80-72, 80-167, 83-62
6:2350 Recall of Persons on Lay-off ... 78-10, 79-51
6:2352 Status of Persons on Lay-Off ... 83-34
6:2354 Rights to Recall ... 79-31, 80-69, 82-84, 83-31, 83-76, 83-103
6:3000 The Skill and Ability Requirement ... 78-06, 78-10, 78-18, 78-27, 79-15, 79-51, 80-10, 80-14, 80-66, 80-97, 80-129, 81-13, 81-35, 81-122, 82-61, 82-68, 83-25, 83-62, 83-103, 83-106
6:3100 The Scope of Arbitral Review ... 78-18, 79-15, 79-51, 80-06, 80-10, 80-66, 80-97, 80-129, 81-122, 81-125, 81-126, 81-127, 80-128, 82-61, 82-68, 83-36, 83-58, 83-79, 83-83
6:3200 Proof of Ability ... 78-18, 78-27, 79-51, 80-10, 80-14, 80-106, 81-25
6:3210 Senior Employee with the Required Ability ... 78-10, 78-18, 79-51, 80-59, 80-69, 80-72, 80-145, 80-163, 80-167, 81-25, 81-35, 81-39, 82-07, 82-90, 83-31, 83-36
6:3220 Senior Employee if Relatively Equal ... 80-14, 80-106, 80-160, 81-125, 81-126, 81-127, 81-128, 83-73, 83-79
6:3230 Trial, Training and Familiarization Periods ... 80-14, 80-145, 80-160, 80-163, 80-167, 81-25, 81-39, 82-61, 83-10, 83-47, 83-74, 83-78, 83-101
6:3300 Ability and Qualifications Criteria ... 78-18, 79-15, 80-66, 80-67, 81-122, 83-79, 83-100, 83-106
6:3310 Disciplinary Records ... 78-27
6:3320 Education ... 80-72
6:3330 Aptitude ... 83-79
6:3340 Examination and Tests ... 78-06, 80-66, 83-03, 83-100
6:3360 Physical Capabilities ... 79-37, 79-51, 80-14, 80-63, 81-39
6:4100 Promotions ... 82-79

7 - DISCIPLINE

7:0000 Introduction ... 78-36, 82-33, 82-58
7:1100 At Common Law ... 80-02, 81-99
7:1200 Where the Agreement is Silent ... 79-18, 79-19, 79-27, 79-36, 79-59, 80-03, 80-08, 80-11, 81-01, 83-37
7:1300 Collective Agreement Limitations ... 82-42, 83-77
7:2000 Discipline and Discharge Procedures ... 78-05, 79-11, 83-17
7:2100 Proceedings Prior to Arbitration ... 79-32, 80-40, 81-14, 82-30, 82-42, 82-95, 83-32
7:2200 Alteration of Grounds ... 79-18, 79-32, 82-33
7:2300 Burden of Proof ... 79-11, 79-19, 79-36, 81-30, 81-43, 81-124, 83-30
7:2500 Standard of Proof: Criminal Misconduct ... 78-05, 80-55, 80-131, 80-165, 80-166, 82-106
7:3000 Grounds of Discipline ... 78-05, 78-07, 78-11, 78-20, 78-23, 78-24, 78-28, 78-33, 78-36, 78-37, 78-38, 78-39, 78-41, 78-42, 79-02, 79-07, 79-10, 79-11, 79-45, 79-46
7:3010 Off-Duty Behaviour ... 78-24, 80-118
7:3100 Attendance at Work ... 79-60, 80-53, 80-117, 80-120, 80-138, 80-161, 80-172, 81-10, 81-114, 82-96, 83-09
7:3110 Notification of Absence ... 80-05, 80-07, 80-31, 80-120, 80-138, 80-161, 81-69, 82-17, 83-32, 83-53
7:3112 Reasonable Explanation of Absence ... 80-117, 80-161, 80-172, 80-178, 83-09, 83-32
7:3120 Leave of Absence ... 78-42, 80-38, 80-109, 80-115
7:3130 Leave Work Without Permission ... 78-11, 78-28, 79-27, 80-07, 80-36, 80-79, 80-89, 80-144, 80-151, 81-06, 81-09, 81-10, 81-30, 81-52, 81-54, 81-70, 82-17
7:3140 Lateness ... 78-07, 78-42, 79-24, 80-178, 81-85, 83-98
7:3200 Employee Disability ... 80-136, 80-162, 81-69, 81-106, 82-114, 83-06, 83-09, 83-71, 83-82
7:3210 Innocent Absenteeism ... 79-02, 80-15, 80-136, 80-155, 81-106, 82-05, 82-63, 83-06, 83-82
7:3220 Inability to Discharge Employment Obligations ... 79-02, 79-33, 82-114, 83-09, 83-71, 83-82
7:3230 Medical Examinations ... 79-04, 80-123, 82-25, 82-52
7:3240 Employer Responses Other Than Termination ... 79-02, 80-136, 83-09, 83-26
7:3250 Onus ... 82-05, 82-63, 83-81
7:3300 Dishonesty ... 78-37, 80-91, 80-118, 82-104
7:3310 Theft ... 78-05, 78-37, 80-55, 80-131, 80-165, 80-166, 81-62, 81-79, 82-99, 82-106, 82-109, 83-05, 83-23, 83-52, 83-55, 83-71, 83-72, 83-108
7:3312 Obligation of Explanation ... 80-12, 80-118, 83-06, 83-23, 83-75
7:3314 Penalty ... 78-05, 78-37, 80-131, 81-62, 83-05, 83-23, 83-72, 83-75
7:3320 Falsification of Employment Records ... 80-05, 80-91, 83-75
7:3322 Production Records ... 80-142, 82-46
7:3330 Conflict of Interest ... 80-142, 82-46
7:3410 Sabotage ... 80-112, 83-22
7:3422 Criminal Convictions ... 78-24
7:3430 Fighting, Assault ... 80-16, 80-68, 82-40, 82-107, 83-19, 83-40, 83-96
7:3500 Work Performance ... 78-21, 79-07, 79-11, 80-44, 82-32, 82-87
7:3510 Incompetence ... 79-11, 79-26, 79-33, 80-53, 80-89, 80-168, 80-171, 81-20, 81-28, 81-67, 81-119, 81-124, 83-15, 83-22, 83-30, 83-90

7:3520 Carelessness ... 78-20, 80-112, 81-08, 82-37, 83-37, 83-56
7:3530 Unsuitability ... 78-21, 79-11, 79-33, 83-15
7:3540 Penalties for Work Related Misconduct ... 78-20, 78-42, 79-02, 79-11
7:3542 Warnings, Suspensions, Discharge ... 78-07, 78-20, 78-24, 78-33, 78-42, 79-02, 79-11, 79-46, 80-02, 80-44, 81-124, 82-33, 83-15, 83-37, 83-53, 83-77, 83-112, 83-116
7:3544 Disciplinary Demotion ... 79-20, 83-01
7:3546 Non-Disciplinary Demotion ... 78-21, 83-26, 83-57, 83-90
7:3550 Personal Appearance ... 78-21
7:3560 Alcoholic Beverages or Drugs ... 78-36, 79-07, 79-11, 79-27, 80-02, 80-43, 80-78, 80-92, 80-107, 82-17, 82-96, 83-06, 83-35, 83-98
7:3570 Sleeping on the Job ... 80-18, 81-22
7:3580 Failure to Co-operate ... 79-18, 83-22
7:3600 Insubordination ... 78-11, 78-23, 78-33, 78-36, 78-37, 78-38, 78-41, 79-10, 79-45, 79-46, 80-39, 80-53, 80-169, 82-75, 82-78, 82-87, 83-96
7:3610 Refusal to Follow Instructions ... 78-23, 78-36, 78-38, 79-19, 79-23, 79-26, 79-33, 79-45, 80-11, 80-28, 80-36, 80-39, 80-65, 80-83, 80-84, 80-89, 80-93, 80-171, 81-07, 81-16, 81-36, 81-68, 81-84, 81-86, 81-91, 81-94, 81-103, 81-120, 82-01, 82-28, 82-34, 83-10, 83-22, 83-53, 83-70, 83-75, 83-77, 83-102
7:3612 Essential Ingredients ... 79-19, 79-23, 79-33, 80-11, 81-07, 81-16, 81-36, 83-77
7:3620 Exceptions ... 83-09
7:3621 Health and Safety ... 80-11, 81-07, 81-84, 83-09, 83-60, 83-102
7:3623 Union Officials ... 82-100
7:3626 Reasonable Personal Excuse ... 78-11, 79-33, 83-102
7:3630 Refusal to Work Overtime ... 78-39, 78-41, 79-10, 81-105, 82-58
7:3634 Compulsory Overtime ... 79-10, 80-151
7:3636 Reasonable Personal Excuse ... 80-64
7:3640 Refusal to Cross Picket Line ... 79-43, 79-46
7:3660 Insolent Unco-operative Behaviour, Obscene Language ... 78-33, 78-37, 78-38, 80-03, 80-20, 82-91, 83-19, 83-40, 83-96
7:4000 Disciplinary Penalties ... 78-28, 78-38, 78-39, 78-41, 81-08, 81-58, 83-102
7:4100 Scope of Review ... 80-31, 80-36, 80-172, 81-10, 82-40, 83-09, 83-40, 83-52
7:4210 The Nature of Disciplinary Sanctions ... 79-43, 80-02, 83-56, 83-93
7:4220 Monetary Penalties ... 80-96. 81-96
7:4240 Multiple Penalties ... 81-08
7:4250 Demotion ... 81-91
7:4300 The Reasonableness of the Penalty ... 78-20, 78-23, 78-28, 78-39, 78-41, 79-46, 81-120, 82-19, 82-33, 82-46, 82-75, 82-78, 83-90, 83-108, 83-112, 83-116
7:4310 The Doctrine of the Culminating Incident ... 78-23, 80-07, 80-28, 80-84, 80-89, 80-99, 81-22 81-67, 81-111, 82-19, 82-33, 82-91, 83-10, 83-70, 83-35, 83-96
7:4312 The Final Incident ... 78-23
7:4314 Use of the Prior Record ... 78-23, 81-52, 81-54
7:4320 Union Officials ... 79-47, 80-170
7:4400 Mitigating Factors ... 78-28, 78-39, 79-46, 80-161, 82-10, 82-33, 82-37, 82-46, 82-91, 82-104, 82-107, 83-19, 83-23, 83-72
7:4410 Employer Conduct ... 78-21, 78-28, 78-38, 79-46
7:4412 Provocation ... 78-28, 78-38, 80-20, 83-102
7:4414 Discrimination ... 78-21, 80-141, 81-32, 81-91, 82-19, 82-40, 82-48, 82-63, 82-78, 82-100

7:4416 Warnings ... 80-02, 83-77, 83-108
7:4420 The Employee ... 78-20
7:4422 Rehabilitative Potential ... 80-02, 80-43, 80-107, 81-09
7:4424 Employee's State of Mind ... 78-20
7:4426 Economic Hardships ... 78-20
7:4427 Compassion ... 78-20
7:4428 Employment Record ... 78-20, 80-20, 81-79, 82-109, 83-52, 83-72, 83-75, 83-112
7:5000 Probationary Employees ... 80-147, 81-37, 81-53, 82-27
7:5010 Measurement of Probationary Period ... 80-152, 82-27, 83-73
7:5020 Standard of Review of Disciplinary Action ... 79-24, 80-23, 81-37, 82-15, 83-30
7:7000 Discharge Distinguished ... 78-07
7:7100 Resignation ... 78-07, 79-59, 80-37, 80-39, 82-53, 82-97, 83-72
7:7200 Retirement ... 82-21
7:7400 Termination of Operations ... 83-73

8 - COMPENSATION

8:0000 Introduction ... 81-113
8:1000 Entitlement to Wages ... 78-02, 78-08, 79-08, 79-56, 81-101, 82-71, 82-74, 83-38, 83-39, 83-74, 83-78
8:1100 Equal Pay for Equal Work ... 83-38
8:1200 Wage Guarantees ... 78-08, 79-08, 82-71, 82-74
8:1300 Retroactivity ... 80-96, 82-88
8:1400 Alteration of Wages ... 83-41, 83-91, 83-92
8:1410 Overpayment ... 80-88, 81-89
8:1420 Witholding Wages ... 81-96, 83-95
8:2000 Premium Rates and Bonuses ... 78-22, 78-43, 79-52, 82-50
8:2100 Overtime ... 78-22, 78-43, 79-52, 80-25, 80-175, 81-72, 81-74, 82-04, 82-23, 82-43, 82-67, 82-111, 83-82, 83-111
8:2110 Daily Overtime ... 78-43, 79-52, 80-175, 83-68, 83-115
8:2120 Weekly Overtime ... 78-22, 82-67, 83-65, 83-97
8:2130 Overtime Work ... 79-40, 80-125, 82-23, 82-44, 83-87, 83-94
8:2200 Incentive Rates ... 81-102, 82-10
8:2220 Setting the Rate ... 81-118
8:2320 Progressive Wage Increases ... 81-93, 83-46
8:2330 Educational or Experiential Increments ... 82-88
8:2400 Cost of Living Allowance ... 81-87
8:3000 Fringe Benefits ... 78-29, 78-32, 78-43
8:3100 Holiday Pay ... 81-73, 81-109, 82-11
8:3110 Payment for Holidays Falling on Non-Working Days ... 80-33, 80-49, 83-43
8:3120 Qualifying for Holiday Pay: Qualifying Days ... 78-03, 79-14, 80-174, 82-111, 83-34, 83-105
8:3122 Absence Caused by Lay-Off ... 83-34, 83-105
8:3123 Absence Owing to Illness ... 80-174
8:3130 Performing Work on Statutory Holiday ... 79-44, 80-126, 81-19, 82-11, 82-111
8:3140 Holiday Pay and Other Benefits ... 80-137, 81-55, 83-21
8:3200 Vacation Benefits ... 78-29, 78-32
8:3210 Purpose and Entitlement ... 79-21, 79-61, 81-60
8:3220 Credited Service for Vacations ... 78-32, 79-61, 80-80, 81-56

8:3230 Computation of Vacation and Vacation Pay ... 78-32, 79-61, 81-15, 81-56, 81-59, 81-108, 82-98, 83-24
8:3240 Scheduling Vacations ... 80-90, 80-110, 80-130, 83-86
8:3250 Vacations and Other Benefits ... 79-42, 79-61, 80-13, 82-110, 82-113, 83-33
8:3300 Illness: Benefits and Other Rights ... 78-13, 78-14, 78-29, 79-42, 82-25, 82-26, 83-91
8:3310 Payment of Medical Premiums ... 80-27, 80-49, 82-45, 83-63
8:3320 Qualifying for Medical and Disability Benefits ... 78-13, 79-60, 80-56, 80-123, 80-148, 81-61, 82-110, 83-69, 83-116
8:3330 Multiple Benefits ... 81-89, 83-21
8:3340 Entitlement to a Job ... 78-14, 80-136, 80-155, 81-78
8:3342 Proof of Recovery ... 78-14, 80-104, 82-96
8:3400 Call-In Pay ... 78-43, 81-02, 81-05, 81-11, 81-55, 82-49
8:3410 Purpose and Entitlement ... 78-43
8:3510 Purpose and Entitlement ... 80-41
8:3530 Duration ... 83-59
8:3700 Paid Breaks ... 80-24, 81-49, 81-64, 83-44, 83-61
8:4100 Safety Equipment ... 83-102

9 - UNION RIGHTS AND LIABILITIES

9:1000 Union Rights ... 78-47, 80-21
9:1100 Recognition ... 79-58, 80-24
9:1200 Union Security ... 78-47, 79-39, 80-09, 80-22, 80-42, 80-62, 80-135, 82-02, 82-38, 82-45, 82-66, 82-89, 82-92, 82-116, 83-11, 83-45
9:1300 Grievance Procedure ... 79-32, 80-57
9:1400 Union Business on Company Time ... 83-51
9:1500 Union Officers ... 79-47
9:1520 Promotional Opportunities ... 78-18
9:2000 Union Liability ... 81-115
9:2100 Strikes and Lockouts ... 82-58, 83-113
9:2210 Rights Under the Agreement ... 83-24
9:2400 Liability for an Unlawful Strike ... 79-47, 82-47
9:2410 Employees ... 79-47, 80-73, 80-87, 80-93, 80-141, 82-100
9:2420 Union Officials ... 79-47, 80-73, 80-87, 80-141
9:2430 Union ... 81-110
9:2434 Vicarious Responsibility ... 81-92
9:2500 Damages ... 82-47